No. 14789

United States
Court of Appeals
for the Ninth Circuit.

MICHAEL R. PLASTINO and RUTH C. PLASTINO,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS, GEORGE HODGDON, C. K. WARREN and OSCAR TITTLE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-14-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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GEORGE W. WINSLOW,
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Tillamook, Oregon,

For Appellees.

In the District Court of the United States
for the District of Oregon

No. 7293

MICHAEL R. PLASTINO and RUTH C. PLASTINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

PRETRIAL ORDER

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the above-entitled action came on for pretrail conference before the Honorable, the Judge of the above-entitled court, on the date and at the hour subscribed hereto.

I. Appearances:

The plaintiffs appeared in person and by one of their attorneys, Robert R. Rankin; the defendants Estber Mills and Edna Mills, Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, Loran D. Harveston, Lyle Simmons, C. K. Warren and Oscar Tittle appeared by George P.

Winslow and William C. Ralston, their attorneys; defendant George Hodgdon appeared by Irving Rand, one of his attorneys.

II. Statement of Nature of Case:

Plaintiffs, as assignees of a contract for a deed to purchase the hereinafter described lands in Tillamook County, State of Oregon, from defendant Mills, seek specific performance of the modified contract to give a good and sufficient deed of conveyance to said property, described as follows:

> All that part of the Southeast Quarter of the Southwest Quarter of Section 22, Township One North, Range 10 West of the Willamette Meridian lying East of the State Highway.
>
> Also known as Lot 8 in Section 22, Township One North of Range 10 West of the Willamette Meridian, less 1¼ acres heretofore conveyed to Pacific Railway and Navigation Company, containing in all 43.46 acres, more or less.

To secure title thereto and the protection thereof, plaintiffs have deposited in this court $925.90 as the unpaid balance of the full purchase price and asked that the same be reduced at the prorata rate per acre for the number of acres defendants Mills cannot convey, from the 43.46 acres said defendants agreed to deed. Plaintiffs further seek a reduction in the purchase price or a judgment against defendants Mills for the excess payments of taxes over the true amount thereof paid by plaintiffs to defendants

Mills and for damages in the cutting of timber from the said property which was the proximate cause of defendant Mills' conduct.

Plaintiffs further seek relief against defendants Mills by plaintiffs being adjudged the owners in fee of said land, free of all encumbrances, for immediate possession thereof, including all emoluments and appurtenances thereto.

Plaintiffs seek relief against all defendants or those acting under them by enjoining all from trespass, or claiming any interest in the property, for quieting title and for plaintiffs' costs as allowed by statute.

Certain defendants cut or removed timber from the realty without plaintiffs' knowledge or consent and without legal title to the timber or logs and plaintiffs demand judgment against those defendants for their damages to the land and for the value of the timber and ask the Court to double or treble those damages against those who wilfully injured or severed or carried off the trees or logs without lawful authority, upon an accounting by them of the timber so destroyed.

Defendant George Hodgdon, appearing for himself alone, denied that the plaintiffs during 1952, when he was interested with others in logging the timber on the said realty, had any right, title, interest or equity in or to said lands or any part thereof. All other defendants denied the allegations of the complaint not noted as hereinafter admitted, and

pleaded for an order dismissing the complaint for lack of jurisdiction over the subject matter, because it failed to state a claim upon which relief could be granted because necessary parties to the suit were lacking, namely, R. F. Hogan and Sally Hogan, husband and wife, and because defendants were improperly joined.

III. Stipulations:

By agreement of counsel for respective parties hereto, it is ordered that the subsequent course of this action shall be governed by the following Stipulation of Facts:

On Specific Performance

(1) Each of the plaintiffs is now and was at the time of beginning this action a citizen of and resident in the State of Washington.

(2) Each of the defendants is now and was at the beginning this action a citizen of and resident in the State of Oregon.

(3) Michael R. Plastino and Ruth C. Plastino and R. F. Hogan and Sally Hogan, Estber Mills, commonly called "Joe" Mills, and Edna Mills, Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, are, respectively, husbands and wives; that Sally Hogan is the daughter of plaintiffs.

(4) R. F. Hogan and Sally Hogan have since December 19, 1945, been citizens of and residents in the State of Washington.

(5) Estber Mills is and at all times since Sept. 7, 1945, has been the owner in fee simple of the real estate located in Tillamook County, Oregon, and described in Paragraph I of this Order. Said property is unimproved, wild land covered with brush and trees which were growing.

(6) On November 7, 1945, defendants Mills, for valuable consideration made, executed and delivered to R. F. Hogan and Sally Hogan a written instrument, marked "Exhibit 1," which incorporated the terms and provisions for the original sale by Mills and purchase by Hogan of the real property described, with the exception that the assignment of R. F. Hogan and Sally Hogan to Michael R. Plastino and Ruth Plastino dated January 25, 1946, and the acknowledgment made before a notary public by Estber Mills and Edna Mills on August 27, 1949, were subsequently endorsed upon said Exhibit 1 upon their respective dates and that Exhibit 1 was on August 29, 1949, recorded by the Plastinos in Book 119, at page 359-360 of Record of Deeds of Tillamook County, Oregon. Defendants Mills received the $100.00 consideration mentioned in Exhibit 1 and knew that Exhibit 1 was recorded.

(7) On January 25, 1946, and again on April 11, 1950, R. F. Hogan and Sally Hogan, for valuable consideration, in writing transferred all their interest in the contract and to the real estate described in Exhibit 1 to plaintiffs Plastino; the assignment of April 11, 1950 was acknowledged before a notary public and recorded April 14, 1950, in Book 122, at

page 327, Record of Deeds of Tillamook County, Oregon.

(8) On January 30, 1951, Mills alone wrote a letter (Exhibit 18) to Michael R. Plastino alone stating the contract (Exhibit 1) was "cancelled" on January 1, 1951, for failure to keep up his payments and pay taxes.

(9) Defendants Mills never made any written demand for payment of installments on said contract.

(10) Taxes on said realty were paid by defendant Mills and the amount charged to the plaintiffs and added to the balance due on the purchase price of said realty, due from the plaintiffs to defendants Mills.

(11) On December 18, 1953, the plaintiffs deposited in the above-entitled court and cause and tendered to defendants Mills the sum of $925.90.

(12) At no time after Wendling took his receipt on December 7, 1951, did he ever procure a deed or bill of sale, but just the receipt for money.

On Damages:

(15) Sigmund J. Wendling became acquainted with Lot 8 about 1951 as someone informed him there was timber on it and he was interested in logging it, and he got the arrangements through Ray Douglas because he knew Mills. Wendling looked the timber over and was willing to pay $1,500. He asked Douglas to go over and get the

timber from Mills which he did. Wendling paid Ray Douglas $1,500 and Douglas paid Mills $1,500 and Wendling paid Douglas nothing. Ray Douglas procured from Estber Mills and Edna Mills, his wife, a receipt for $1,500.00 (Ex. 26), reciting that defendants Mills sold to Ray Douglas timber on said Lot 8, and on December 8, 1951, Sigmund Wendling gave a receipt for $1,500.00 for the timber sold on said Lot 8 to Ray Douglas, all disclosed on the single sheet marked Exhibit 26. This was the only instrument Wendling ever got from defendants Mills and Douglas. He never made a survey, just followed blazes which he didn't know by whom were made. Wendling relied on the receipt for his right to cut the timber on Lot 8, or to transfer the timber to anyone. Wendling heard about the Hogan contract and the Plastino's interest in Lot 8 three or four months before January, 1954, from the Plastinos themselves.

(16) On Jan. 1, 1952, under a logging contract between Publishers' Paper Co. and Sigmund J. Wendling, Wendling negotiated to sell approximately 400 M board feet of additional spruce and hemlock, as shown by Ex. 27, Paragraph 21 of which related to timber on Lot 8. On March 4, 1952, Wendling tendered to Publishers' Paper Co. the two receipts (Ex. 26) and a timber deed (Ex. 28), a copy of which Wendling has in his file, to all of the timber standing or fallen on said Lot 8, covenanting that he was the lawful owner of said property,

which was signed and acknowledged and delivered to Publishers' Paper Co. to induce them to buy the timber on Lot 8. The Publishers' Paper Co. rejected said deed and receipts and requested a title research and proper instruments of conveyance in a letter dated March 13, 1952 (Ex. 29) which was a letter from the firm of Koerner, Young, McColloch & Dezendorf directed to Mr. S. J. Mammano, an employee of the Publishers' Paper Co., and by S. J. Mammano delivered to Sigmund Wendling, advising that Wendling was not in position to convey good title and asking for a preliminary title report, deed from Mills et ux to Publishers' Paper Co., quitclaim deed from Douglas et ux, quitclaim deed from Wendling et ux.

(17) On May 5, 1952, defendant Sigmund Wendling made and entered into an agreement with Publishers' Paper Co. whereby Wendling agreed to supply approximately 400,000 feet of spruce and hemlock and Wendling convenanted to save the Publishers' Paper Co. harmless from all charges, liens and encumbrances, and the logs were to be delivered by January 1, 1953, at the rate of $31.00 per thousand for grades 2 and 3 and other grades at the current market prices (Ex. 30). Wendling still got no title report nor made any investigation of the record, or knew of the Hogan or Plastino contract.

(18) On the .... day of June, 1952, Sigmund J. Wendling made a contract with C. K. Warren (Ex. 31) in which Wendling recited that he was the

owner of the timber on said Lot 8 and would sell Warren all standing and down merchantable timber for the sum of $1,500, which contract of logging was to be completed before the rainy season and all logs removed were to be sold to Publishers' Paper Co. All Wendling wanted was his money out of the contract which he got from Publishers' Paper Co. by means of Exhibit 32, dated September 10, 1952.

(19) On July ...., 1952, C. K. Warren made a partnership agreement with George Hodgdon (Ex. 33) to log approximately 40 acres on Lot 8, which was under contract between Sigmund Wendling and C. K. Warren, whereby Hodgdon was to furnish the equipment needed and Warren was to pay the $1,500 stumpage.

(20) On September 10, 1952, C. K. Warren and Sigmund Wendling gave a letter to the Publishers' Paper Co. to hold out $1,500 which was to be paid Sigmund Wendling for the stumpage on Lot 8. (Ex. 32).

(21) The Wendling-Warren contract of June 1952 (Ex. 31) expired Oct. 5, 1952, and Warren had fallen about 40 M feet or 50 M feet of timber when his time had run out. So Warren went to Mills and got more time. Then Warren and Harveston got together to log Lot 8 and together they secured from defendants Mills their agreement allowing them to log Lot 8, dated Dec. 11, 1952 (Ex. 34). Harveston and Warren wanted until Dec. 10, 1953, but Mills changed a part of that contract (p. 3 of Ex. 34) to provide for notice of extension within ten days of

July 10, 1953. The timber not removed by Dec. 10, 1953, would revert to Mills.

(22) Warren appraised his work and the interest in the 100 M feet left on Lot 8 at $225.00 and Harveston told Warren he would buy his interest for $225.00, provided he could get an extension of time from Mills. This extension was granted in Exhibit 34, and thereupon Harveston paid Warren the $225.00 and secured Warren's assignment of his interest in the contract (Ex. 34) and the timber on Lot 8. The assignment was dated Dec. 12, 1952 (Ex. 35).

IV. Plaintiffs' Contentions of Fact:

Plaintiffs will contend that the following are the facts regarding the issues indicated by the subject in the following paragraphs:

1. After December 7, 1951, the defendants in the particulars herein disclosed went on said Lot 8, cleared ways, built roads, cut timber, removed some logs thereof, left logs and slashings on the lot for which plaintiffs claim damages against all defendants. Based on the above, the amount in controversy involves the following approximate sums of money or value of property involved—

(a) Specific performance of a contract to convey Lot 8 in the Southeast Quarter of the Southwest Quarter of Section 22, Township 1 North, Range 10 West ofthe Willamette Meridian, lying East of the state highway in Tillamook County, Oregon, as described in the com-

plaint, is sought and which land was of the value of not less than $4,000.00 on or about Jan. 30, 1951.

(b) Damages caused to the land for the purposes for which it was purchased, in the approximate sum of $3,000.00.

(c) Loss of timber on said land in the approximate sum of $3,500.00 which the Court is asked to double or triple, as the facts may direct, to the sound discretion of the Court, to $6,000 or $9,000.

(d) Damages in the sum of $500.00 as cost to clean the property of slashings, logs and brush left by the loggers to prevent a fire hazard.

2. Value of the property claimed by plaintiffs is corroborated by defendants Mills in the following particulars: Plaintiffs paid to Mills on said property $800.00. Mills received from Wendling for the timber alone $1,500, and Mills asked for the land and remaining timber $1,200 to $1,500, making a total of from $3,500 to $3,800.

3. Defendants Mills knew of the Hogan assignment to Plastinos of Jan. 25, 1946 (Ex. 1) not later than August 27, 1949, or within a year after the contract (Ex. 1) was executed.

(4) On Nov. 29, 1946, defendant Mills wrote he had not followed the contract (Ex. 1) as written, and directed the purchasers, Hogans and Plastinos,

to make the following changes, as evidenced in writing and substantially as follows:

> "Received your letter regarding interest on your contract. I have not followed the contract as it was written. I have charged you with interest as you made your payments and applied the balance to the principal. In doing it this way you will save a few dollars. I have outlined to you just how it has been done, so if you will take your contract and apply these payments as I have you will find the interest is less, but you will owe more on the principal than you thought you owed. The $25.00 a month is all right with me. Or if you want to pay more that will be alright with me also but if I were you I would pay the $25.00 and I will take the interest out as you go along.
>
> "I had to pay the taxes which I added to the Bal. You will notice on your tax receipt that there was 1 acre taken off. This small piece of land lies west of the highway which was in this parcel of land. I kept this out for some of the fishermen have a small house on it." (Ex. 2).

(5) On Aug. 5, 1948, the plaintiffs asked defendants Mills for permission to skip their August payment and on August 16, 1948, defendants Mills granted permission and gave greater leniency, as evidenced in writing and substantially as follows:

> "It is quite alright to skip your payments for August and any other time when you are short." (Ex. 6).

(6) By Mills' authority contained in Exhibits 2 and 6, the provision of Exhibit 1 as to time of payment and strict performances of said contract were waived.

(7) The directions of defendants Mills, as contained in Exhibits 2 and 6, were knowingly consented to and mutually followed by all parties to Exhibit 1 and performed from not later than Nov. 29, 1946, up to Jan. 30, 1951, without objection. The Exhibit 1, as so modified, should be called "said contract" to distinguish it from Exhibit 1 as originally written. Defendants Mills never made any changes in the directions given in Exhibits 2 and 6 until his letter (Ex. 18).

(8) Defendants Mills never made any written objections to late or delayed payments on said contract

(9) During the period the Hogans paid on "said contract" in the year 1946, three installments, to wit, April, October and November, 1946, were skipped by purchasers; during the period the Plastinos paid on "said contract"; there were no failures to make monthly installment payments in 1947; there were three payments skipped in 1948 during the months of August, November and December; there were two payments skipped in 1949 during the months of March and August; there were six payments skipped from July to December, inclusive, in 1950. When a payment was skipped, interest was added to the balance. A rejection by defendants Mills of the

plaintiffs' offer to pay the next monthly installment payment in January of 1951, terminated payments.

(10) At no time did defendants Mills, from and after November 7, 1945 (Ex. 1) and the dates of the modifications of "said contract," orally notify plaintiffs, or their predecessors in interest, that they were not performing the terms and conditions of "said contract," or were in default thereon, or give any notice of any change in terms from those agreed upon in and by "said contract," nor specify any time within which the plaintiffs were to perform the terms or provisions, nor make any demands for installments or for full or final payment of the purchase price, or tender any deed or demand any part or full performance of "said contract" by the plaintiffs or either of them; defendants Mills did not give plaintiffs any warning of a proposed cancellation or specify any time for performance or attempt to restore the terms of the original contract (Ex. 1); nor have defendants Mills foreclosed or attempted to foreclose the same in any court having jurisdiction of said property in the manner provided in said contract, or at all.

(11) That Mills' letter of January 30, 1951 (Ex. 18) was the first notification of any change in the attitude of defendants Mills in connection with the performance of "said contract" and the first attempt to cancel the contractual relations between the parties thereto and as of a prior date; that plaintiffs had no notification of cancellation as of January 1, 1951.

(12) Plaintiffs' letter of February 4, 1951, (Ex. 19) to defendants Mills enclosing a check for the $25.00 monthly installment was mailed prior to the receipt by plaintiffs of any notice of cancellation of "said contract" by defendants Mills and payment was made in conformity with the requirements of "said contract."

(13) That it was plaintiffs' promises of renewal of monthly installments of $25.00 made January 25, 1951 (Ex. 17) which caused defendants Mills to write their letter of proposed cancellation on January 30, 1951 (Ex. 18) and predating said alleged cancellation to January 1, 1951 (Ex. 18) in order to anticipate any monthly installment payment by plaintiffs, as promised in their letter of January 25, 1951.

(14) Defendants Mills approved and ratified plaintiffs' skipping monthly payments when they were short of money, adding interest on the unpaid balance and taxes when due and paid by defendants Mills to the total balance due on "said contract." (Ex. 13-A, 13-B, 14).

(15) Defendants Mills never extended their abstract of title to Lot 8 after their purchase thereof, procured a title report, had the lot surveyed or did anything to terminate plaintiffs' interest except his letter of Jan. 30, 1951 (Ex. 18); never told the defendants about the Mills-Hogan-Plastino contract.

(16) Defendants Mills received but made no objection to excuses of non-payment of monthly install-

ments made Sept. 13, 1950 (Ex. 16) or January 25, 1951 (Ex. 17).

(17) Taxes were paid by defendants Mills on Lot 8 and by said defendants charged to plaintiffs, but when so charged to or paid by plaintiffs, said taxes so paid to Mills were on property owned by Mills but not sold to plaintiffs, such as lands west of the property in Lot 8, tidelands in front of Lot 8, and defendants Mills acknowledged the error, promised to correct the charges and never effected a segregation for tax purposes of the lands sold to plaintiffs from his lands and did nothing about correcting the over-charges contained in the balances he demanded be paid by plaintiffs. Defendants Mills never sent any statements to plaintiffs for taxes to be paid. (Ex. 9, 10, 13, 13-A, 14, 15).

(18) Eliminated from Lot 8, as sold to the plaintiffs, were the highway right of way of 2.7 acres, land between the railroad right of way and State Highway, west of highway and tidelands in front of Lot 8 and the railroad right of way of ¼ acre, leaving in Lot 8 purchased by plaintiffs ..... acres.

(19) Defendants Mills never advised the plaintiffs he had sold the timber on said Lot 8 or was endeavoring to sell the land, but plaintiffs on a visit to said Lot 8 discovered the same for themselves, and defendants Mills have rendered themselves incapable of conveying said premises as agreed in "said contract."

(20) Eliminating defendants Mills, none of the defendants ever at any time secured any title or procured any conveyance to said Lot 8 or the timber thereon, or secured any title report, or made any search of the records of title to Lot 8 personally or through another, or made any inquiry of defendants Mills as to their title, and defendants Mills never told any defendants of the Mills-Hogan-Plastino contract.

(21) Plaintiffs tendered sums on "said contract" in the following amounts at the following times: $25.00 check on Feb. 5, 1951 (Ex. 20-A); plaintiffs' offer to pay balance due on contract in August, 1953; $675.00 certified check offered defendants Mills Aug. 26, 1953 (Ex. 21); tender into court of $925.90 (Comp. 11) on Dec. 18, 1953, to cover all sums due.

(22) Wendling (see Par. 15-18, supra) was a gypo logger who supplied labor, equipment and supplies for logging operations. His business was felling timber, bucking and transporting logs and he endeavored to buy the timber on Lot 8, but after the Publishers' Paper Company's attorneys delivered to him a letter advising he did not have good title to said timber (Ex. 18), he never logged any of said timber himself. He claimed not to have known why the Publishers turned him down. He did not know of state regulations. When he contracted, he did not contemplate selling the timber. He never told about the letter he had from the law firm about an insufficient title. (Ex. 29).

(23) Those defendants who had to do with damaging the timber or Lot 8 are as follows:

(a) Those who cut timber: C. K. Warren made a sales agreement in June, 1952, with Wendling (Ex. 31) wherein Warren agreed to buy and Wendling to sell all the standing and down timber on Lot 8 for the sum of $1,500 payable from logs delivered to the Publishers' Paper Co. at $10.00 per thousand board feet until $1,500 was paid, the contract to be completed Oct. 5, 1952. Warren went in with Simmons and they felled and bucked timber for about ten days and Simmons was the first fellow to cut timber. Later Warren went in with George Hodgdon (Ex. 33). Then, after getting the contract from Mills (Ex. 34), Warren went in with Harveston (Ex. 35). When Harveston came in, Warren had about 40 M feet felled and Warren sold his interest to Harveston for $225.00. While he and Simmons had felled and bucked about 100 M feet, Warren, with his associates, cut a total of between 165 M and 175 M feet, most of which they sold to Publishers and about 10 M of which they sold to Oregon Pulp. He felled and left on the ground about 40 M feet and he left standing from 20 M to 50 M feet. Warren started in July and ended on Sept. 15, 1952, when Publishers' Paper Co. took no more logs. Warren sold to Harveston Dec. 12, 1952 (Ex. 35). Warren paid outside help of three men, besides themselves, $1,693.32. The logs were branded "JJ." The best timber was along the highway which they did not take because they thought they would take

the hardest part of it first, but the timber left was too little except one man go in with a small "cat" and helper, and the price of logs was up. One could not use a yarder. It would cost too much and there was not enough timber left. Wendling never told Warren he had a letter (Ex. 29) which stated that Wendling did not have good title, but he showed Warren his receipts (Ex. 26) and after Warren sold his interest to Harveston on Dec. 12, 1952 (Ex. 35), Warren never went near Lot 8. Warren had no record of timber because he left all of that to Hodgdon who had a bookkeeper and kept the records.

George Hodgdon went into the timber deal when it was being carried on by Warren and Simmons. Simmons thought he had about $400.00 in his work in cutting the timber and was willing to sell for that, so Hodgdon paid him $400.00 in cash and took over Simmons' interest. Hodgdon and Warren entered into a partnership agreement dated July, 1952 (Ex. 33) which was the only agreement Hodgdon and Warren had. Warren had previously tried to find someone with equipment to put in there and Hodgdon had good equipment and Warren was to furnish the timber and buy the stumpage of $1,500 (Ex. 33) and Hodgdon was to furnish the equipment and together they would log Lot 8. They were to complete the work with diligence and share the profits and losses equally. Hodgdon quit because they had no place to sell logs and he had other timber to log and wanted to get his yarder off of Lot 8.

In place of Warren buying the stumpage of $1,500, Warren and Wendling gave to Publishers' an order to pay to Wendling $1,500 on Sept. 10, 1952 (Ex. 32) which Publishers' Paper Company did, and thereby Hodgdon paid one-half of the stumpage that Warren should have paid. Hodgdon logged the timber and delivered it to the Publishers and the Publishers gave statements which are correct so far as he knew. He hauled part of the logs to Publishers at Manhattan Beach with his equipment and does not know where there were deliveries of logs except at Manhattan and Ken Hodgdon's mill. It cost $4.00 per thousand for hauling to Manhattan. Hodgdon had a crew of four or five men at a time which included a choker-setter, loader, engineer, "cat" man and truck man. He never did anything with the slashings, and all logs taken in were branded "JJ" which was his brand. He hired two men to haul logs, Wade Kerby and another, to Manhattan Beach. He closed the deal with Warren by paying each other what there was to pay, spent the money and quit. When he went away, there was somewhere in the neighborhood of 100 M feet which they had cut and which lay on the ground.

Lyle Simmons worked with the timber on Lot 8 with Warren for about ten days and was the first fellow to cut timber for Warren. He felled and bucked about 100,000 feet, but they kept no records nor scaled any logs and they delivered these to the Publishers. Simmons told Warren in substance that Warren better go down and get a contract with

Wendling before they (Simmons and Warren) went any further because they had gotten in far enough. Simmons also said, "Wendling could come in here after we get 100,000 feet felled and bucked and tell us to get out of here." Warren told him Wendling would draw up a contract which he later did. Simmons got out because he did not like the looks of things and did not like Wendling. Then there was no written contract between Warren and Simmons. Simmons sold to Hodgdon his interest for $400.00.

(b) The people who also confederated in doing damage to the property were:

Loran D. ("Red") Harveston went onto Lot 8 sometime in the summer or fall of 1953, the driest part of the year, under his written contract with defendants Mills (Ex. 34). Warren had some logs in there he had felled and bucked. Harveston did not help Warren take any timber off the property, but two weeks before Harveston's contract ran out he and McCloskey went in with a power saw and sawed and limbed some trees that were on the ground, cut up something like a dozen logs, probably 8 or 10,000 feet. He paid Warren $225.00 for his interest on December 12, 1952, and took an assignment (Ex. 35). Harveston promised to buy Warren's interest if Warren got an extension of time from Mills which Warren did. Harveston saw defendants Mills who had told him they would write the people in Seattle, who had just bought the land and see if the Seattle people would give more time,

and if they would, then Harveston could pay Mills $225.00 and go ahead and log it. Harveston wondered why he should pay Warren $225.00 and another $225.00 to Mills. Mills said he would send a wire and later said he had gotten back an answer, so Harveston went down to Mr. and Mrs. Mills and Mrs. Mills said, "I have just finished copying a message from them people in Seattle and they say that it is all right to sell the timber that was bucked and felled and still on the property for $250."

Mills said they had just talked to the Seattle people, and this is more fully repeated in Harveston's deposition from page 22 to page 25.

Harveston never felled a stick of timber and just cut the logs and chopped the limbs.

Oscar Tittle went on Lot 8 in July, 1952, and did the road work for about three days and charged $12.50 per day and Warren paid him $315.00. Tittle used a D-7 "cat" with dozer and Warren showed him where to go, the course to take and he cut the roads from ten to fourteen feet wide, cut places for turns and made fill-ins, taking about one-half to an acre of clearing for yarding. Tittle built this road before Hodgdon got to logging, so Hodgdon signed the check to pay Tittle for putting in the road on to Lot 8 to log off the timber that had been cut.

(24) None of the defendants ever procured a title research or report, or ran a survey, or made a search of the records themselves, or asked about the

title, or gave any deed to the timber, or started any foreclosure in court on their cohorts.

(25) W. M. Docker's cruise of 343,575 board feet taken from Lot 8 and 102,000 board feet left standing thereon, totaling 445,575 board feet, proves Sigmund Wendling was conservative when he twice contracted to deliver to Publishers' Paper Co. 400,000 board feet on Jan. 1, 1952 (Ex. 27, page ....) and again May 5, 1952 (Ex. 30).

(26) Said Lot 8 had merchantable and commercial timber growing thereon, and the lot lies on the flat top and slope of a hill, with a stream of water running through a part thereof, and the site is from an elevation commanding a view of the town of Garabaldi, the shore, countryside, bay and ocean and useful, among other things for residential and park purposes.

(27) Defendants Mills never in writing advised the plaintiffs they were in default or that there were deficiencies in payment, or demanded payment in full for said contract or payment of taxes, or demanded performance or insisted on time being of the essence of the contract in writing. Said defendants Mills never tendered a deed, never expressed themselves as willing to perform the contract, did not know why on January 30, 1951, they had attempted to cancel the contract as of January 1, 1951; never offered to give back any money and stated they never intended to do so and never brought foreclosure of the contract in any court,

nor extended the abstract after their purchase and never procured a title report or survey of Lot 8.

(28) On Feb. 1, 1951, there was due on said contract $775.27.

(29) Defendants Mills have permanently ousted the plaintiffs from said real property.

(30) Dft. Wendling never got a deed, bill of sale or title report.

(31) Defendant Wendling never told Warren, while making his deal with Warren, that he had a letter (Ex. 29) in his file questioning his title, never looked up the record and at the time he executed the timber deed (Ex. 28) did not know what title he was conveying and took no warranty from defendants Mills as to title and told Warren nothing about the title to the timber.

(32) When Warren was selling to Harveston his interest, Harveston told Warren he had nothing to sell.

(33) Harveston was out of timber elsewhere and had big equipment that was idle. Warren had his interest in the Hodgdon-Warren agreement of July, 1952 (Ex. 33) and had felled about 100M feet of timber left on Lot 8.

V. Defendants' Contentions of Fact:

(1) No contract in fact existed between the plaintiffs and Estber Mills and Edna Mills in reference to the sale of Lot 8 described in Paragraph III in the complaint.

(2) Any claim of right or interest arising by assignment of the contract dated November 7, 1945, from R. F. Hogan and Sally Hogan were abandoned by the plaintiffs.

(3) Title to Lot 8 has at all times remained in Estber Mills and Edna Mills, husband and wife.

(4) There has been no modification in fact of the terms of the contract of November 7, 1945 (Exhibit 1 to the complaint) since the date of its execution.

(5) That as of January 30, 1951, the contract of November 7, 1945, was in default.

(6) The defendants Estber Mills and Edna Mills at no time trespassed on the property owned by them, namely Lot 8 as described in Paragraph III of the complaint.

(7) The remaining defendants likewise have, at no time, trespassed on Lot 8 as a matter of fact.

(8) The contract of November 7, 1945, has not, in fact, been breached by the defendants Mills with either the plaintiffs or anyone else.

(9) There was no concealment of any facts or information by the defendants Estber Mills and Edna Mills from the plaintiffs.

(10) With the exception of the defendants Estber Mills and Edna Mills, none of the defendants had notice, either constructive or actual, of any claim of ownership or right, title and interest in any timber on Lot 8.

(11) If any of the defendants cut or removed any timber from Lot 8, they did so in good faith and without notice or knowledge that they might be violating the rights or claim of rights of any person whomsoever.

(12) Since the date of contract, Nov. 7, 1945, all taxes on Lot 8 have been paid by defendant Mills.

(13) Plaintiffs have waived all claims against defendants, except as to defendant Estber Mills.

(14) There was no concerted action or conspiracy on the part of the defendants or any of them with respect to the matters described in the complaint.

VI. Plaintiffs' Issues of Law:

Plaintiffs contend that the following principles of law are applicable to this case and support plaintiffs' contentions:

(1) That this Court has jurisdiction of this cause.

(2) That plaintiffs have never defaulted in the monthly payments due under "said contract."

(3) That the plaintiffs have never breached any of the terms or conditions of "said contract."

(4) That the plaintiffs are entitled to have "said contract" specifically performed by the defendants Mills in accordance with its terms, and this applica-

tion is addressed to the sound and reasonable discretion of the Court.

(5) That plaintiffs are entitled to have their title quieted as to all claims of all the defendants, jointly and severally.

(6) That the plaintiffs are entitled to have an injunction against trespass by the said defendants, jointly and severally.

(7) That plaintiffs are entitled to a good and sufficient deed from the defendants Mills and in the event such is not given, that the decree of this Court stand as such conveyance.

(8) After a decree of specific performance vesting legal title in said plaintiffs, that plaintiffs have as an ancillary remedy, a judgment for damages against the defendants, jointly and severally, for the amount of the reduction in value of said real property and for the amount of damages caused by the cutting of timber.

(9) That as to those defendants who cut or carried away the logs that were manufactured from said timber, the plaintiffs have damages against them on the grounds that they wilfully did such cutting without legal title to said timber or the logs derived therefrom and without authority of the plaintiffs. Otherwise, there would be no remedy in anyone to correct the unlawful asportation by certain defendants.

(10) That the cutting of said timber or the carrying away of the logs therefrom is within the

statute authorizing the doubling or trebling of damages and the Court is asked to exercise its discretion in favor of awarding either double or treble damages as the total evidence dictates.

(11) That judgment against the defendants for actual damages be against all defendants, jointly and severally, because of their confederated action or as tort feasors.

(12) That plaintiffs have a judgment that defendants Mills have breached their contract and abandoned the same unlawfully.

(13) That the amount of plaintiffs' tender is sufficient and should be reduced by the amount of damages defendants Mills caused plaintiffs, with a judgment against defendants Mills for any excess of damages.

(14) That the amount of damages due from said defendants Mills be augmented by any excess payments in taxes made by plaintiffs to defendants Mills.

(15) That all defendants were trespassers upon plaintiffs' estate.

(16) That all defendants had at least constructive knowledge of plaintiffs' right, title, interest and estate in and to said real property by virtue of the recorded contract and assignments thereof and defendants Mills had actual knowledge and defendant Sigmund Wendling had actual knowledge that he had no title, or a defective title in and to said timber which he subsequently attempted to convey.

(17) That by reason of plaintiffs' recording of their contract (Ex. 1) and of the assignments from the Hogans (Exhibits 1 and 23), the defendants are charged with knowledge of plaintiffs' right, title, interest, claim and estate in and to said real property and the logs manufactured therefrom.

(18) Defendants Mills and defendant Wendling came into court with "unclean hands."

(19) Each contract for cutting timber created an encumbrance on Lot 8.

(20) A legal obligation existed upon defendants Mills to have prevented waste to the estate of plaintiffs, both legal and equitable.

(21) That plaintiffs are entitled to an abatement of the purchase price in accordance with the true acreage sold by defendants Mills.

(22) If defendants Mills had effected a recission, they should have endeavored to restore the status quo of plaintiffs.

(23) Plaintiffs, at their option, are entitled to specific performance, although the defendants Mills cannot perform in full.

(24) The measure of damages to the land is an amount of money determined to be the difference in the value of the land immediately before and immediately after the wrongful act, and the amount so awarded must compensate plaintiffs fully for losses which are the proximate result of the wrongdoers' conduct.

(25) The measure of damages for the loss of trees injured or destroyed, where the trees have a separable or apportionable value, is the reasonable market value of the trees at the time and place of conversion.

(26) Damages to the property, other than the cutting of trees, may be recovered, and the real market value before and after the cutting is the measure.

(27) Damages are compensatory and plaintiffs are entitled to such amount as would compensate them for putting their property back in substantially its former condition.

(28) The Court, if it finds those who cut or carried off any trees from the lands of another did so wilfully and without lawful authority and judgment be given for the plaintiffs for damages, the Court may treble the amount thereof in its discretion.

(29) If the evidence satisfies the Court the trespass was casual or involuntary and the defendants had probable cause to believe the land on which the trespass was committed was his own, judgment shall be given for double damages.

(30) A vendee who does not own title, nor is in possession, nor has a right of immediate possession until he has paid the purchase price, has a right of action for damage which may be trebled.

(31) "Time is of the essence" is a provision of

the contract and may be waived either expressly or by conduct.

(32) The person to whom a tender is made shall at the time specify any objections, or he must be deemed to have waived them.

(33) There is a disputable presumption that an unlawful act was done with an unlawful intent.

(34) The recording of an instrument entitled to be recorded, as Exhibits 1 and 23, is constructive notice to purchasers and encumbrancers who, subsequent to the recording, acquire or claim to acquire some interest or right in the realty.

(35) Such purchaser is charged with notice, not only of the existence and legal effect of the instrument, but all references therein contained.

(36) The recording of Exhibit 1 and the assignment, Exhibit 23, were authorized by law.

(37) No instrument executed by defendants Mills with or between any of the other defendants conveyed any title to land or timber.

(38) Defendant Hodgdon appeared by two Answers through two different sets of attorneys and the Answers were inconsistent with each other. Being the pleader, the pleading is construed most strongly against the pleader and the only issue raised by Hodgdon is whether plaintiffs had any equity in Lot 8 during 1952 when Hodgdon was interested with others in logging the timber on Lot 8.

(39) Certain defendants, by their Answer, seek to raise the question of the jurisdiction of this Court on the matter of the amount involved. On April 5, 1954, Chief Judge Fee ruled the matter should be raised by motion and directed the filing of such motion.

VII. Defendants' Issues of Law:

(1) The Court lacks jurisdiction of the subject matter of the cause of suit or action.

(2) The complaint does not state a claim against any defendant upon which relief can be granted.

(3) The complaint should be denied because necessary parties to the suit are lacking, namely, R. F. Hogan and Sally Hogan, husband and wife.

(4) The complaint should be denied as to the defendants Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren and Oscar Tittle, as they have been improperly joined in tort in an action based on contract.

(5) No contractual relation existed at any time between the plaintiffs and Estber Mills and Edna Mills. Consequently, the said defendants cannot be held liable for damages, nor can they be required to specifically perform their agreement by anyone not a party thereto.

(6) The defendants Estber Mills and Edna Mills

were entirely in their rights in selling off the timber from Lot 8.

(7) Defendants Estber Mills and Edna Mills were both legal and beneficial owners of Lot 8 and the timber thereon at the time of the cutting or removal of timber from Lot 8.

(8) The contract of November 7, 1945, was in default as of January 30, 1951, on which date the plaintiffs were so notified in writing. As of the date of January 30, 1951, the contract of November 7, 1945, was abandoned by both R. J. Hogan and Sally Hogan and the plaintiffs.

(9) The plaintiffs have not been damaged in any amount whatever by any cutting or removal of timber from Lot 8 by any of the defendants.

(10) The plaintiffs are not entitled to an accounting by any of the defendants.

(11) There was no conspiracy in fact or law among the defendants or any of them with respect to the severance or removal of timber from Lot 8.

(12) Plaintiffs waived any claims which they may have had against all defendants except Estber Mills.

VIII. Exhibits:

The following exhibits, marked as indicated on each item, may be introduced and received at trial without further proof or identification and subject only to the objection of materiality, competency and relevancy, unless a specific objection to any exhibit

is indicated with reference to the same, but no objection can be made that the same are not originals because they are copies, either photostat, typed or written, nor to the certification thereof.

The parties agree that the following depositions have been taken from witnesses duly sworn and may be used by any party to this cause at the trial as by law and the Federal Rules of Civil Procedure provided: that all questions as to notice, form, time and place of the taking and the signing by witnesses are waived and all objections as to the form of the question are waived unless they were objected to at the time of the examination, but all the testimony is subject to objections at the trial of materiality, competency and relevancy.

A. Plaintiffs' Exhibits

Estber Mills' Deposition

Exhibit No. and Description:

1—Photostat copy of contract between defendants Estber Mills et ux and R. F. Hogan et ux, dated Nov. 7, 1945. [12*]

2—Letter dated Nov. 29, 1946, from defendant Mills to Hogans stating "I have not followed the contract as it was written." [19]

3—Letter dated Sept. 7, 1947, from plaintiffs to defendant Mills enclosing money order and appreciation for showing property. [20]

[*Original page nos. Estber Mills' Deposition.]

4—Letter, June 28, 1948, plaintiffs to Mills—will mail money order on 9th. Hope this all right. [22]

5—Letter, Aug. 5, 1948, Plastino to Mills, asking release from August payment. [23]

6—Letter, Aug. 16, 1948, Mills to Plastino—"It is quite all right to skip your payments for August and any other time you are short." [23]

7—1946-'47 tax statement, $34.36—paid Oct. 30, 1946. [26]

8—Tax statement for 1947-'48, $40.23, paid Oct. 24, 1947. [26]

9—Tax statement for 1948-'49, $55.35, paid Nov. 4, 1948. [26]

10—Tax statement for 1949-'50, $124.77, paid Oct. 24, 1949. [27]

11—Letter dated April 6, 1949, defendants Mills to Plaintiffs. "Your balance is now $928.13." Discusses logging of the land. [27]

12—Letter, Feb. 2, 1950, plaintiffs to defendants Mills enclosing a list of payments made from plaintiffs' records, requesting check on them. [29]

13—Letter, March 7, 1950, defendants Mills to plaintiffs—1c mistake, 45 installments made, your taxes are $124.77. You owe $874.07. [31]

13-A—Three pages of accounting figures. [31]

13-B—Envelope postmarked March 7, 1950, addressed to M. R. Plastino. [31]

14—April 19, 1950 letter, Plastino to Mills, questioning the statement on amount of taxes due; suggest segregation. [35]

15—Letter, April 27, 1950, Mills to plaintiffs, regarding investigation at court house. Correction in tax statement. "I will take the blame." [41]

16—Letter dated Sept. 13, 1950, plaintiffs to defendant Mills. Been out of work, begin payments in near future. [43]

17—Letter, Jan. 25, 1951, Plastino to Mills—just got back to work, long illness, tough luck, appreciate your help. [45]

18—Letter, Jan. 30, 1951, E. Mills to Mr. Plastino —"Your contract was cancelled Jan. 1, 1951, for failing to keep up your payments and taxes." [45]

19—Letter, Feb. 4, 1951, plaintiffs to Mills: I am enclosing check. Believe we will be able to continue payments and pick up back payments later. [54]

20—Envelope marked Feb. 7, 1951, addressed to M. R. Plastino. [54]

20-A—Check No. 843, Plastino to Mills on the National Bank of Commerce, Central Branch, for $25.00. [54]

21—Letter dated Aug. 26, 1953, to Mr. and Mrs. Joe Mills from attorney for plaintiffs, John W. Hathaway, tendering certified check for $675.00 drawn on the Central Branch, National Bank of Commerce, enclosing a form of deed. [61]

21-A—Receipt for registered articles, No. 1416, signed by Mills. [61]

21-B—Return Receipt Card No. 1416. [61]

22—Letter dated Aug. 31, 1953, to Attorney John W. Hathaway from Attorney Geo. P. Winslow returning check for $675.00 and rejecting offer. [61]

23—Assignment dated April 11, 1950, from R. F. Hogan and Sally Hogan to Ruth C. Plastino and Michael R. Plastino for $500.00 consideration, of contract (Exhibit 1). [12]

24—Receipt for $100.00 and cancelled checks and American Express money order stubs from Nov. 5, 1945, to June 28, 1950, payments on contract.

25—Summary of payments disclosed by cancelled checks and money order stubs and also showing omissions of payment, made by C. S. Courtenage under direction of plaintiffs, disclosing balance due of $775.27.

Sigmund J. Wendling Deposition

Exhibit No. and Description:

26—"Receipt" on a single page, dated Dec. 7, 1951, from Mills et ux to Ray Douglas for timber on Lot 8, acknowledging receipt of $1,500 "paid in full," and below, on the same sheet but dated Dec. 8, 1951, is a receipt from Ray Douglas to Sig Wendling for $1,500 for timber on Lot 8. [36*]

[*Original page nos. Sigmund J. Wendling Deposition.]

27—Logging contract dated Jan. 1, 1952, between Publishers' Paper Company and Sigmund J. Wendling for 400M. board feet to be supplied from Lot 8 if there. [44]

28—Proposed timber deed dated March 4, 1952, from Wendling to Publishers covenanting he is lawful owner of timber and free from encumbrances. [46]

29—Letter dated March 13, 1952, from Koerner, Young, McColloch & Dezendorf, attorneys for Publishers' Paper Co., turning down the title and prescribing the requirements for clearing title before they would receive logs. [55-57]

30—Agreement dated May 5, 1952, between Publishers' Paper Co. and Wendling concerning Jan. 1, 1952 agrement and agreeing to supply 400M. feet of spruce and hemlock on or before Jan. 1, 1953, at prices mentioned. [57]

31—Contract dated June .., 1952, between Wendling and Warren, selling timber on Lot 8 for the amount of $10.00 per M board feet up to $1,500 to be assigned to Publishers' Paper Co., to be completed before Oct. 5, 1952. [60]

32—Letter of instruction dated Sept. 10, 1952, from Warren and Wendling to Publishers' Paper Co. for paying $1,500. [62]

33—Agreement dated July .., 1952, between Hodgdon and Warren for partnership in logging Lot 8. [101]

34—Agreement dated Dec. 11, 1952, from defendants Mills to Warren and Harveston for logging Lot 8. [103]

35—Assignment dated Dec. 12, 1952, from Warren to Harveston of all interest in logging contract, Exhibit 34. [105]

36—State Highway Commission map of Lot 8 and Stipulation by all parties for use in survey of Lot 8.

37—Marshal's map of Lot 8.

38—Stump Cruise of Lot 8, hemlock and spruce, by W. M. Dockery—321,750 board feet.

38-A—Dockery's Cruise of standing timber, spruce and hemlock, 102,000 board feet.

39—4-page accounting by Publishers' Paper Co. of logs received from Hodgdon and Warren from Aug. 14, 1952, to Sept. 30, 1952, totaling 212,720 feet sold for $7,145.89.

40—Accounting of the Columbia Paper Mills.

41—Pictures relating to Lot 8, taken by Plastinos Sept. 3, 1953—(1) new logging road looking on to Lot 8 across Highway 101; (2) as above; (3) looking west toward Highway 101 from new cat road; (4) slashings on Lot 8; (5) logs and slashings on Lot 8; (6) new cat road and slashings on Lot 8; (6) new cat road and slashings on Lot 8; (7) logs and slashings on Lot 8; (8) new logging road, stumps and slashings on Lot 8; (9) spar tree, stumps and slashings and logging road on Lot 8; (10) spar

tree from different angle, stumps, slashings and logging road on Lot 8; (11) another view of spar tree, stumps and logging road, logs and slashings on Lot 8; (12) slashings on Lot 8; (13) stumps and slashings on Lot 8; (14) logs and slashings on Lot 8; (15) spar tree and slashings on Lot 8; (16) slashings, stumps and logging road, Lot 8; (17) slashings, Lot 8; (18) stumps and slashings, Lot 8; (19) stumps and slashings, Lot 8; (20) stumps and slashings, Lot 8; (21) stumps, slashings and logging road, Lot 8.

42—Certified copy of tax statement involving Lot 8, for 1945-'46, $137.93.

43—Certified copy of tax statement, Lot 8, for 1946-'47, $93.14.

43-A—Certified copy of tax statement for 1946-'47, on the south 60 feet of Thayer's Addition.

43-B—Certified copy of tax statement for 1946-'47, on one acre of Lot 8.

44—Certified copy of tax statement for 1947-'48, Lot 8, $87.30.

45—Certified copy of tax statement for 1948-'49, Lot 8, $115.49.

46—Certified copy of tax statement for 1949-'50, Lot 8, $124.77.

46-A—Certified copy of tax statement for 1949-'50, one acre of Lot 8 and the south 60 feet of Thayer's Addition.

47—Certified copy of tax statement for 1950-'51, Lot 8, $63.41.

48—1951 Oregon Forest Laws.

49—Oregon Forest Laws of 1953, supplementing the 1951 Laws.

50—Deposition of Sigmund J. Wendling, 64 pages, taken Jan. 29, 1954, before Gordon R. Griffith, Notary Public and Court Reporter.

51—Deposition of C. K. Warren, 40 pages, taken Jan. 29, 1954, before Gordon R. Griffith.

52—Deposition of Loran D. Harveston, 34 pages, taken Feb. 17, 1954, before Jack Ellis, Notary Public and Court Reporter, (to be signed by Harveston).

53—Deposition of George Hodgdon, 25 pages, taken Feb. 19, 1954, before Jack Ellis.

54—Deposition of Estber Mills, 65 pages, taken March 3, 1954, before Mary Wakefield, Notary Public and Court Reporter.

55—Figures in pen and ink, written by Mills, in his accounting of a balance due on the contract in the sum of $830.82.

56—Pencil accounting by Mills of payments on the contract.

B. Defendants Exhibits

100—Defendants' unexecuted copy of the contract of Nov. 7, 1945, showing a balance of $717.05 due "6/31/50."

101-A—Envelope postmarked Sept. 13, 1950.

101-B—Letter from Plastinos to Mills. (See Plfs'. Ex. 16.)

102-A—Envelope.

102-B—Letter from Plastinos to Mills, dated Jan. 4, 1951.

103-A—Return postal receipt, dated 2/3/50.

103-B—Letter, dated Jan. 30, 1951. (See Plfs'. Ex. 18.)

104-A—Envelope, postmarked Feb. 3, 1947.

104-B—Letter, dated Jan. 31, 1947, from Hogans to Mills.

105-A—Envelope, postmarked Aug. 26, 1953.

105-B—Letter, Hathaway to Mills tendering $675.00. (See Plfs'. Ex. 21.)

106—Winslow's letter to Hathaway, dated Aug. 31, 1953. (See Plfs'. Ex. 22.)

IX. Trial By Jury:

Is waived by the parties and they stipulate all issues may be tried by the Court.

X. Pleadings:

Since the pre-trial conference has been held and participated in by all parties, it is ordered that the issues of law and fact are fully set forth herein and the pleadings now pass out of the case and this Pre-trial Order shall control the subsequent course of trial and shall not hereafter be amended except by consent of the parties or order of the Court to prevent manifest injustice.

Dated this 20th day of May, 1954, at *May* o'clock ..m.

/s/ GUS J. SOLOMON,
United States District Judge.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiffs.

PHILIPS, HODLER &
SANDEBERG and
WILLIAM C. RALSTON,

By /s/ WM. C. RALSTON,
Attorneys for All Defendants.

/s/ IRVING RAND,
Attorney for Defendant
George Hodgdon.

[Endorsed]: Filed May 20, 1954.

[Title of District Court and Cause.]

OPINION

March 18, 1955

Solomon, Judge:

On November 7, 1945, defendants Estber Mills and Edna Mills, as vendees, and R. F. Hogan and Sally Hogan, as purchasers, entered into a contract for the sale and purchase of a portion of Lot 8, Section 22, Township 1 North of Range 10 West of the Willamette Meridian, containing 43.46 acres more or less, located in Tillamook County, Oregon, for the sum of $1,575.00. The contract provided for the payment of $100.00 at the time the contract was executed and the balance to be paid at $25.00 per month plus interest, beginning December 1, 1945. All taxes thereafter levied against the property were to be paid by the purchasers.

The contract, which was on a commonly used printed form, contained a provision for the prompt payment of installments and strict performance of all conditions of the contract. The contract also contained the following provision:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any

such provision or as a waiver of the provision itself."

On January 26, 1946, the Hogans assigned all of their rights to the contract to plaintiffs, which assignment was endorsed on the contract of sale above described. Thereafter the Hogans executed a formal assignment transferring all of their interest to the plaintiffs. In neither assignment did the plaintiffs promise or agree to assume the payments or other obligations of the Hogans. All of the $25.00 monthly payments, with the possible exception of the first one, were made by the plaintiffs.

Shortly after the execution of the contract, it was agreed that the $25.00 monthly installments were to include both principal and interest.

In 1946, with the consent of Estber Mills, plaintiffs failed to make three of the monthly payments; in 1948, three more payments were missed; in 1949, two payments; in 1950, no payments were made during the last six months.

On January 30, 1951, at a time when no payments had been made for almost seven months, and when there was $775.27 due on the principal, defendants Mills notified plaintiffs that the contract had been cancelled on January 1, 1951, for failure to make the necessary installment payments or pay the taxes. Within a few days thereafter, plaintiffs tendered a payment of $25.00 which was rejected on the ground that the contract had previously been terminated.

In December, 1951, Sigmund Wendling, a logger in the area, contacted Ray Douglas, a tavern owner, and told him he was interested in purchasing the timber on Lot 8 so that he could log it. Douglas contacted Mills, and a sale of the timber was arranged. Douglas received no compensation for his services. Wendling then attempted to sell the timber to Publishers' Paper Co., but the deal fell through apparently because the Publishers' Paper Co. received a letter from its attorneys to the effect that from the records made available to them, Mr. Wendling was not in a position to convey good title. These attorneys suggested that a title insurance policy in the sum of $1,500.00 together with deeds from Mills, Douglas and Wendling and their respective wives be obtained.

Thereafter Wendling entered into an agreement with C. K. Warren by which he agreed to sell all of his interest in the timber on the tract for $1,500.00, the amount he had paid for it. This contract, dated June, 1952, contemplated that the logs would be sold to Publishers' Paper Co. and that from the logs delivered, Wendling would be paid at the rate of $10.00 per thousand until the purchase price had been paid.

Thereafter, in July, 1952, Warren entered into an oral partnership agreement with Lyle Simmons to log this lot and, Simmons worked for about 10 days during which time they felled and bucked about 100,000 feet, which was sold to Publishers' Paper Co.

In July, 1952, George Hodgdon paid Simmons $400.00 for his interest in the partnership and entered into a partnership with Warren. They felled some of the timber on the lot and delivered a portion of the timber that was cut into logs to Publishers' Paper Co. At about this time, Oscar Tittle did some road work on this lot with his tractor for which he was paid $315.00.

Later, George Hodgdon transferred his interest to Loran D. Harveston, who with C. K. Warren obtained an extension of time within which to remove the timber. While Harveston did limb a few trees and sawed them into logs, he did not remove any timber from the property.

On August 26, 1953, the plaintiffs tendered to defendants Estber Mills and Edna Mills the sum of $675.00, the entire amount which they claimed was due on the contract.

On December 18, 1953, the plaintiffs filed an action in which they tendered into court the sum of $925.90, their revised figure as to the amount due under the contract, and commenced an action for specific performance against Estber Mills and Edna Mills. They also demanded damages from not only defendants Mills, but also from Ray Douglas and Pauline Douglas, his wife, Sigmund Wendling and Dorothy Wendling, his wife, Loran D. Harveston, Lyle Simomns, George Hodgdon, C. K. Warren, and Oscar Tittle, claiming that all of the defendants had participated in a confederation or conspiracy against them.

My task has not been simplified by the pleadings in this case. The complaint sets out in great detail evidentiary matters, and these are repeated and elaborated upon in the pre-trial order. Instead of simplifying the issues, they were made more complicated. The voluminous briefs continued the process.

However, in spite of this mass of material, I have carefully considered each contention made in the pleadings, as well as in the briefs.

At the conclusion of the testimony I expressed the opinion that a number of persons who were joined as defendants should not have been made parties because their participation, if any, in the alleged wrong was so minor or so remote. I was told, however, that they were joined on the basis of a "confederation," and I was assured that a confederation is different than a conspiracy. Although I seriously considered dismissing this case for lack of jurisdiction, I came to the conclusion that, absent a showing of bad faith, the allegations in the complaint alleging the proper jurisdictional amount are sufficient to support jurisdiction based upon diversity.

I, therefore, find that this court has jurisdiction over the parties and subject matter of this action.

I have carefully considered the case on its merits, and I have come to the conclusion that the defendants are entitled to judgments in their favor without costs.

In arriving at this conclusion I am well aware of the fact that the conduct of defendant Estber Mills is not commendable. He is a shrewd and cynical person. I am convinced that this property has as little value as he testified it was worth, and I am firmly of the opinion that the land or the timber was never worth the amount for which it was sold by him either to the Hogans or the Wendlings. Neither do I admire him for his action in cancelling the contract of purchase. However, the following excerpt from the case of City of Reedsport v. Hubbard, decided September 22, 1954, by the Supreme Court of Oregon, and appearing in Vol. 59, Page 115, Oregon Advance Sheets, at Page 128, sets forth my views concerning the reach of my authority:

> "* * * The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. It is not the province of the court to rewrite a contract for the purpose of accomplishing that which, in the court's opinion, might appear proper. ORS 174.010, 174.020; Fendall v. Miller, 99 Or 610, 196 P. 381; Sinnott v. Interstate Contract Co., 86 Or 189, 168 P. 81."

I, therefore, find that under a contract which contains the following provision:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

a vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.

I am even more convinced that the failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their $25.00 check was returned to them constitutes an abandonment of any title which they might have held at that time.

It is clear that an unperfected equitable title may be lost by abandonment. Although the mere passage of time is not sufficient to constitute abandonment, that fact coupled with the failure to pay taxes and the failure to remonstrate with the defendant Estber Mills after having received a letter notifying them of the cancellation, in my opinion indicates that at

some time during that period the plaintiffs intended to and did abandon their interest in the property.

Defendants may prepare findings of fact and conclusions of law and a judgment in their favor without costs.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on for trial before the Honorable Gus J. Solomon, Judge of the above-entitled Court, the plaintiffs appearing in person and by their attorney Robert R. Rankin, the defendants Estber Mills and Edna Mills, husband and wife; Ray Douglas and Pauline Douglas, husband and wife; Sigmund Wendling and Dorothy Wendling, husband and wife; Loran D. Harveston; Lyle Simmons; C. K. Warren; and Oscar Tittle appearing in person and by their attorneys George P. Winslow and William C. Ralston, and the defendant George Hodgdon appearing in person and by his attorney Irving Rand, and a pre-trial conference having been had and a pre-trial order having heretofore been entered, and the Court having heard the evidence of the plaintiffs and evidence of the defendants and the cause having been argued and the case submitted, and the Court being fully advised in the premises now makes the following:

Findings of Fact

I.

This Court has jurisdiction over the parties and subject matter of this action.

II.

On November 7, 1945, defendants Estber Mills and Edna Mills, as vendees, and R. F. Hogan and Sally Hogan, as purchasers, entered into a contract for the sale and purchase of a portion of Lot 8, Section 22, Township 1 North of Range 10 West of the Willamette Meridian, containing 43.46 acres more or less, located in Tillamook County, Oregon, for the sum of $1,575.00. The contract provided for the payment of $100.00 at the time the contract was executed and the balance to be paid at $25.00 per month plus interest, beginning December 1, 1945. All taxes thereafter levied against the property were to be paid by the purchasers.

The contract, which was on a commonly used printed form, contained a provision for the prompt payment of installments and strict performance of all conditions of the contract. The contract also contained the following provision:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any

breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

III.

On January 26, 1946, the Hogans assigned all of their rights to the contract to plaintiffs, which assignment was endorsed on the contract of sale above described. Thereafter the Hogans executed a formal assignment transferring all of their interest to the plaintiffs. In neither assignment did the plaintiffs promise or agree to assume the payments or other obligations of the Hogans. All of the $25.00 monthly payments, with the possible exception of the first one, were made by the plaintiffs.

IV.

Shortly after the execution of the contract, it was agreed that the $25.00 monthly installments were to include both principal and interest.

In 1946, with the consent of Estber Mills, plaintiffs failed to make three of the monthly payments; in 1948, three more payments were missed; in 1949, two payments; in 1950, no payments were made during the last six months.

On January 30, 1951, at a time when no payments had been made for almost seven months, and when there was $775.27 due on the principal, defendants Mills notified plaintiffs that the contract had been cancelled on January 1, 1951, for failure to make the necessary installment payments or pay the

taxes. Within a few days thereafter, plaintiffs tendered a payment of $25.00 which was rejected on the ground that the contract had previously been terminated.

V.

In December, 1951, Sigmund Wendling, a logger in the area, contacted Ray Douglas, a tavern owner, and told him he was interested in purchasing the timber on Lot 8 so that he could log it. Douglas contacted Mills, and a sale of the timber was arranged. Douglas received no compensation for his services. Wendling then attempted to sell the timber to Publishers' Paper Co., but the deal fell through apparently because the Publishers' Paper Co. received a letter from its attorneys to the effect that from the records made available to them, Mr. Wendling was not in a position to convey good title. These attorneys suggested that a title insurance policy in the sum of $1,500.00 together with deeds from Mills, Douglas and Wendling and their respective wives be obtained.

VI.

Thereafter Wendling entered into an agreement with C. K. Warren by which he agreed to sell all of his interest in the timber on the tract for $1,500.00, the amount he had paid for it. This contract, dated June, 1952, contemplated that the logs would be sold to Publishers' Paper Co. and that from the logs delivered, Wendling would be paid at the rate of $10.00 per thousand until the purchase price had been paid.

Thereafter, in July, 1952, Warren entered into an oral partnership agreement with Lyle Simmons to log this lot, and Simmons worked for about 10 days during which time they felled and bucked about 100,000 feet, which was sold to Publishers' Paper Co.

In July, 1952, George Hodgdon paid Simmons $400.00 for his interest in the partnership and entered into a partnership with Warren. They felled some of the timber on the lot and delivered a portion of the timber that was cut into logs to Publishers' Paper Co. At about this time, Oscar Tittle did some road work on this lot with his tractor for which he was paid $315.00.

Later, George Hodgdon transferred his interest to Loran D. Harveston, who with C. K. Warren obtained an extension of time within which to remove the timber. While Harveston did limb a few trees and sawed them into logs, he did not remove any timber from the property.

VII.

On August 26, 1953, the plaintiffs tendered to defendants Estber Mills and Edna Mills, the sum of $675.00, the entire amount which they claimed was due on the contract.

On December 18, 1953, the plaintiffs filed an action in which they tendered into court the sum of $925.90, their revised figure as to the amount due under the contract, and commenced an action for specific performance against Estber Mills and Edna Mills. They also demanded damages from not only defend-

ants Mills, but also from Ray Douglas and Pauline Douglas, his wife, Sigmund Wendling and Dorothy Wendling, his wife, Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren, and Oscar Tittle, claiming that all of the defendants had participated in a confederation or conspiracy against them.

VIII.

That at the time of filing their complaint, the plaintiffs deposited in the registry of this Court, the sum of $925.90 pending the outcome of the trial.

IX.

That subsequent to January 30, 1951, when the plaintiffs were notified that the contract had been cancelled, and prior to the date of the return to them of their check for $25.00, the plaintiffs abandoned their unperfected equitable title in Lot 8.

Based upon the foregoing Findings of Fact, the Court deduces the following:

Conclusions of Law

I.

Under the contract of November 7, 1945, which contains the following provision:

> "The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any

> breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

a vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.

II.

The failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their $25.00 check was returned to them, constitutes an abandonment of any title which they might have held at that time.

III.

All defendants are entitled to judgments in their favor and against the plaintiffs, but without costs.

IV.

The plaintiffs are entitled to the return of the sum of $925.90 deposited with the registry of this Court.

Made and Entered of record this 1st day of April, 1955.

/s/ GUS J. SOLOMON,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1955.

In the District Court of the United States
for the District of Oregon
Civil No. 7293

MICHAEL R. PLASTINO and RUTH C. PLASTINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law heretofore made and entered herein,

It Is Considered, Ordered and Adjudged that the complain of the plaintiffs be, and it is hereby dismissed, and

It Is Further Ordered that the clerk of this Court return to the plaintiffs, the sum of $925.90 heretofore deposited with him.

Made and Entered of record this 1st day of April, 1955.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 1, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING OBJECTIONS

This matter coming on for hearing upon the objections of the plaintiffs to the Findings of Fact, Conclusions of Law and Judgment, and the Court having heard argument of counsel and being fully advised;

Now, Therefore, denies the objections of the plaintiffs to Findings of Fact, Conclusions of Law and Judgment.

Dated this 25th day of April, 1955.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, Michael R. Plastino and Ruth C. Plastino, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the entire final judgment entered in the above-entitled action, also from said District Court's order denying plaintiffs' objections to the Findings of Facts, Conclusions of Law and Judgment for defendants, entered herein on April 25, 1955.

/s/ ROBERT R. RANKIN,
Attorney for Plaintiffs-
Appellants.

[Endorsed]: Filed May 23, 1955.

United States District Court
District of Oregon

Civil No. 7293

MICHAEL R. PLASTINO and RUTH C. PLASTINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

Portland, Ore., Wednesday, May 19, 1954, 9:15 A.M.

Before: Honorable Gus J. Solomon, District Judge.

Appearances:

ROBERT R. RANKIN,
Of Attorneys for Plaintiffs;

WILLIAM C. RALSTON, and
GEORGE P. WINSLOW,
Of Attorneys for All Defendants Except Defendant George Hodgden;

IRVING RAND,
Attorney for Defendant George Hodgden.

TRANSCRIPT OF PROCEEDINGS

* * *

EARL A. MARSHALL

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin: [2*]

* * *

The Court: Are you not going to offer all of your exhibits? [3]

Mr. Rankin: Yes, all that are listed here I am offering.

The Court: To what exhibits do you object, Mr. Ralston, Mr. Winslow?

Mr. Winslow: I have never seen them, your Honor, as far as the list herein. It was rewritten and given to me this morning, and I would like—I do not know of very many objections, but I would like to reserve the right to examine them during the noon hour.

The Court: Very well, we will do that. Have you seen the Defendants' Exhibits, Mr. Rankin?

Mr. Rankin: Yes.

The Court: Have you any objection to any of them?

Mr. Rankin: No objection with the exception that the contract that he offers is not an executed

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Earl A. Marshall.)

contract, and it is only a duplicate of the contract that we have already in evidence.

The Court: It would not make any difference then if you have an executed contract.

Mr. Rankin: Yes.

The Court: Then we will leave out 100 and start with 101-A. 101-A to 106, inclusive, are admitted.

(Envelope postmarked September 13, 1950, marked Defendants' Exhibit 101-A, received in evidence.) [4]

* * *

Mr. Rankin: Did you estimate the area of this part of Lot 8 which we are calling Lot 8 for convenience? Did you estimate the area?

A. Yes, I calculated the area.

Q. What was the area of that part which was purchased by the Plastinoes east of the highway?

A. I haven't got it here. It is on the map, 38.

Q. 34.74? A. That sounds reasonable.

Q. That is on your map?

A. That is on the map.

The Court: 34.74?

Mr. Rankin: Yes, acres; 34.74 acres. [8]

* * *

W. M. DOCKERY

a witness produced in behalf of plaintiffs, having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rankin: [10]

* * *

Q. (By Mr. Rankin): From your work, did you come to an estimate of the total amount of standing timber on this property at some previous time? A. Some previous time?

Q. Yes, did you come to a conclusion within a short—within a year?

A. You mean what they would be on that land altogether before it was logged?

Q. Right, sir.

A. Well, I have the amount that I figured out that was logged and the amount that is [11] standing.

The Court: Give it to us.

Q. (By Mr. Rankin): What are those amounts?

A. The amount that was logged was 321,750 board feet.

The Court: What is that amount?

The Witness: 321,750 board feet.

Mr. Rankin: 321,750 board feet.

The Court: How much is standing?

The Witness: Standing is 102,000 board feet.

The Court: 102,000.

Q. (By Mr. Rankin): Making a total of what?

(Testimony of W. M. Dockery.)

A. Making a total of 423,750 board feet. [12]

* * *

Q. What amount of that was spruce, first, that was cut and removed?

A. The total was 28 trees, 100,140 feet.

Q. Of what?

A. Of spruce, and there was 221,610 of hemlock.

Q. How about that that was standing?

A. Total number standing was 102,000 feet altogether.

Q. How much hemlock and how much spruce?

A. 27,000 hemlock and 75,000 spruce. [13]

* * *

Redirect Examination

By Mr. Rankin:

Q. What would you say as to the quality of the timber that was taken?

A. The quality of the timber that was taken?

Q. Yes. [16]

A. I would say that it was a pretty good quality.

Q. Did you have evidence of peeler logs?

A. Well, a No. 2 log would make a peeler log, and I know there were lots of No. 2's there. There should have been.

Q. What condition did you find the property in as to logs that were dicarded? Were they left there, not hauled off the property after cutting?

A. Well, the ground is just the same as any logged area would be after it has been logged. The

(Testimony of W. M. Dockery.)

slash is still there and is a fire hazard; never had been cleaned off. [17]

* * *

W. HENRY THOMAS

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Rankin:

Q. Mr. Thomas, did you have any indications of where the lines of Lot 8 were? A. No.

Q. How did you get those indications?

A. Earl Marshall made a survey of lot 8 in question. I did not see him personally in the field, but I had his map, and I identified his lines and went to the points on the four corners of the tract.

Q. Have you seen his map? A. Yes.

Q. Exhibit 37 in this case? A. I have. [20]

Q. Did you have it with you when you made your run on these lines? A. Yes.

Q. Who was with you at the time you made this run of these lines?

A. W. M. Dockery and Michael Plastino.

Q. Did you do anything in connection with checking what Mr. Dockery had done in his estimate of standing and felled and removed timber, the stump cruise?

(Testimony of W. Henry Thomas.)

A. I made a casual check of a few of the stumps with Dockery this way. We would agree on the stump diameter, and he would give me his opinion as to the volume of the, the net volume of merchantable timber in that tree, and I agreed with him.

Q. Did you when you made this joint inquiry as to the stump cruise and standing timber have any disagreement? A. No.

Q. About the quantity?

A. No material disagreement.

Q. You just heard Mr. Dockery's testimony, did you, as to the quantity that he found there?

A. I did.

Q. Assuming from your inspection of the premises with Mr. Dockery and from his testimony that there was 423,750 board feet divided into spruce and hemlock in the quantities that I believe you have heard and understand, do you have any opinion of the fair market value of the merchantable standing [21] timber upon this property as of the month of June, 1952? A. I have.

Q. Will you state what your opinion of that fair market value of that standing timber at that time may be? A. $3,049.61.

Q. $3,049.61. Did you find in your inspection of Lot 8, as we are using that expression here, and you understand what is meant by Lot 8?

A. I do.

Q. It is the same as described in Mr. Marshall's map? A. I do.

(Testimony of W. Henry Thomas.)

Q. Did you find any slashings, trash, discarded logs, or anything of that nature left on that property? A. Yes.

Q. From your experience, did that constitute a fire hazard? A. It certainly does.

Q. Have you any idea, Mr. Thomas what it would take in the matter of expenditure to comply with the state law in clearing that Lot 8 of those slashings? [22]

* * *

Q. Will you answer it, please?

A. To put that acreage that had been logged in Lot No. 8 under full compliance with the State Fire Protection Rules, I am of the opinion it would cost from $350 to $400 as a lump sum.

Mr. Rankin: Your witness.

Cross-Examination

By Mr. Rand:

Q. Mr. Thomas, was your estimate of the market value that of the standing timber on this Lot 8 in June, 1952?

A. It is—that lump sum, Mr. Rand, includes the timber that was removed and the timber that is left standing.

Q. As of June, 1952? A. As of June, 1952.

Q. The estimate of value was dependent upon the quantity of timber estimated by Mr. Dockery, was it? A. It was.

(Testimony of W. Henry Thomas.)

Q. On the quality of the timber which was estimated by him [23] also?

A. To a certain extent, Mr. Rand, I was able to form my opinion as to the propable quality of the timber.

The Court: Probable what?

The Witness: Quality, your Honor. Most of the timber had been logged, and the only way that you had of measuring the probable quality—and I use that expression advisedly—is by the size of the stump and the length of the tree. It is an estimate and an opinion sure and simple.

The Court: I think first you ought to tell us what the value of the logged timber and what was the value of the standing timber remaining. Do you have that?

The Witness: I could figure it very quickly.

The Court: Let us hear what that is.

The Witness: This will be rounded off to the nearest dollar if you do not mind.

The Court: That is all right.

The Witness: The timber that was removed, the fair market value is $2,437.

The Court: The balance for the standing——

The Witness: The balance, the fair market value of the timber left is $612, in my opinion.

The Court: What value did you assign to the spruce and what value to the hemlock?

The Witness: I had to break it down, your Honor, a little further than that. I put the spruce pulp logs and [24] the spruce——

(Testimony of W. Henry Thomas.)

Mr. Winslow: Spruce what?

The Witness: Spruce pulp logs and the hemlock pulp logs in at a unit value of $6 per thousand.

The Court: $6 per thousand standing?

The Witness: No, standing and logged.

The Court: I mean before it was logged you came to the conclusion it was worth $6?

The Witness: That is right. The hemlock saw logs, of which there was only 88,000, in my opinion I appraised at a unit value of $7.50 a thousand, and the small amount of spruce saw logs, 75,000, at $11 a thousand.

The Court: Could you tell by looking at the stump and the top what percentage of merchantable timber there was in the portion that was removed?

The Witness: Fairly closely.

The Court: Is it your testimony that you and Mr. Dockery came to the same conclusion as to the amount of stumpage?

The Witness: I agree with his amount of stumpage, yes, sir.

The Court: Is that not very rare for two appraisers who look at the same timber to ever arrive at the same conclusion?

The Witness: You are talking about appraisers. I am talking now about cruising.

The Court: Cruising, that is what I am talking about. [25]

The Witness: That is right. Now, if I may explain this, in checking Dockery's cruise, my only check, as I said previously, was by going to a certain stump. We would agree on the stump diam-

(Testimony of E. W. Ford.)

Q. They would not be feasible for ordinary residential traffic, would they?

A. Well, I think not, in this respect, that I believe that they would be in the wrong location if you wanted to develop that property. [39]

* * *

RUTH C. PLASTINO

a plaintiff, called in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Where do you live, Mrs. Plastino?

A. At 1423 Madrona Drive, Seattle, Washington.

* * *

Q. Did you know about this purchase of this tract at the time it was made on the 7th of November, 1945? A. Yes, sir.

Q. How did you happen to know about it?

A. My daughter called me from Tillamook by telephone.

Q. Did they explain to you the nature of this property? A. They did. [47]

* * *

Q. What did you find in connection with the character of this property? Will you describe it?

A. We found on the highway a quarter of a mile, the property included a quarter of a mile on the

(Testimony of Ruth C. Plastino.)

highway that would make very fine entrance for a motel below, and as we hiked up a very short distance through the trees, and the lay of the land was quite level where we figured we could put in some nice residences that would overlook the town and the bay and out into the ocean, and we found streams in there running right from practically the top of the property down to the highway. It had a very lovely possibility of nice residential homesites in correspondence with some very fine homes right across the highway overlooking the same views, as we saw, from this tract of land that we purchased there. [48]

* * *

Q. (By Mr. Rankin): How long did the children carry this contract?

A. They bought it in 1945, in November. They asked us to advance the money for it, which we did, and they made several payments until she took very ill, and we gave them the money for their payments.

Q. How long did you continue and did they continue to make the payments in their name?

A. I would say approximately—they bought it in 1945, and I believe it was towards the beginning of, the last of 1946, or the beginning of 1947, we had made the payments to them, and then they assigned it over to us.

Q. I will hand you this Exhibit 24, and ask you if you can identify what those are?

A. These are checks. That is the receipt for their down payment, and then checks by the daughter

(Testimony of Ruth C. Plastino.)

and son-in-law and [49] then by my husband and some Railway Express receipts by myself of the payments on the property. [50]

* * *

Q. When you omitted to make payments as this record shows, on the month, what was done with respect to interest?

A. We added the interest to the balance of the principal, and on the next payment we deducted from the $25 the interest of the previous payment and the payment we were making and put the balance of that $25 and deducted it from the—would you say grand total or full total? [51]

Q. Balance due? A. Balance due.

* * *

The Court: You admit that the contract was varied to that extent so as to permit deduction of the interest each month rather than semi-annually?

Mr. Winslow: It was.

The Court: It is admitted, Mr. Rankin, so you do not have to prove that.

Mr. Rankin: Thank you.

Q. Now, take the letter of August 16, 1948, that same fall. Did you have permission to skip payments? A. Yes, Mr. Rankin.

Mr. Winslow: We object except as the letter so states.

Mr. Rankin: That is the reason I am asking

(Testimony of Ruth C. Plastino.)

about it.That is the reason I put the letter in the pre-trial order rather than try to interpret it myself.

Q. Did you skip payments in accordance with that letter?

Mr. Winslow: That still calls for a con- [52] clusion.

The Court: Yes; objection sustained.

Mr. Rankin: Would the Court look at this letter then?

The Court: If it is in evidence. Offer it. It speaks for itself, and the records of payments speak for themselves. If she skipped payments, it shows on the document that has been admitted, No. 25.

Mrs. Plastino, did you rely on the letter that you have in your hand at the time you missed some payments?

The Witness: Yes, your Honor, we wrote and asked for permission to miss some payments due to illness and unemployment.

The Court: Very well. Proceed.

Q. (By Mr. Rankin): Were you ever told anything any different than what those letters disclosed? A. Never at any time.

Q. There is no claim that he modified this in any writing or made any demand for payment, but there is a claim by Mr. Mills that he orally told you. Did he ever orally tell you that you were not performing your contract?

A. At no time was there ever a mention of anything of that type at all.

(Testimony of Ruth C. Plastino.)

Q. Did he ever make any demand for installments orally or in writing? A. Never.

Q. Did he ever tell you you were in default?

A. Never. [53]

Q. Either orally or in writing? A. Never.

Q. Did he ever give you any notice that he was changing what he had specified in these two letters, Exhibits 2 and 6? A. No, sir, never.

Q. Did he ever specify a time when he—when you were required to perform either in full or in part? A. No, sir, at no time.

Q. Did he ever make any demand for installments? A. Never.

Q. Or for full payment, either one?

A. Neither one, sir.

Q. Did he ever tender any deed?

A. No, sir.

Mr. Winslow: Objected to as wholly immaterial.

Mr. Rankin: It is my understanding that when you are suing for specific performance you must show these things, and I agree to it to that extent, and that is the basis of my inquiry.

The Court: Go ahead.

Q. (By Mr. Rankin): Did he ever foreclose this contract? A. No, sir, never.

Q. Or attempt to foreclose it? A. No, sir.

Q. You received a letter from Mr. Mills about January, dated January 30, 1951; did you not? [54]

A. Yes, sir.

Q. In which he says, "Your contract was canceled?"

(Testimony of Ruth C. Plastino.)

The Court: Show her the letter.

Mr. Rankin: Yes, it is in the Mills' deposition.

(Deposition produced.)

Q. (By Mr. Rankin): I show you what has been marked here as Plaintiffs' Exhibit 18.

The Court: Is that the letter of January 30?

Mr. Rankin: That is right.

The Court: Is there any objection?

Mr. Winslow: No.

The Court: It may be admitted. [55]

* * *

Q. (By Mr. Rankin): You recall that letter of January 30th, saying the contract was canceled on the first of January? A. Yes, sir.

Q. Had you on the 1st of January or at any time previous to this letter of January 30th, received any indication that your contract was not in the same condition and status that it was at all times since August, 1948?

Mr. Ralston: I object to that question, your Honor, unless the question explains what contract he is referring to.

Mr. Rankin: Exhibit 1. I thought it was understood by everybody. If the court please, perhaps, I can save a little time. I feel a great pressure here to keep moving. We have specified the original contract as Exhibit 1, and then when Mr. Mills came along with two letters of November and August, Ex-

(Testimony of Ruth C. Plastino.)

hibits 2 and 6, we found a change in that contract, and in our nomenclature throughout the case we have called that changed contract "said contract" as opposed to Exhibit 1. Now, if we can still use that language, it will save a lot of time in specifying.

The Court: You may use any language you desire.

Q. (By Mr. Rankin): Did you find any change in said contract? Do you understand what I mean when I say that? Do you understand what I mean when I say "said contract"?

A. No, I think I missed the first question between you and the interruption. If I may have it again—— [56]

Mr. Rankin: Let us understand each other first, Mrs. Plastino. A. Yes.

Q. When I speak of Exhibit 1, I speak of the original sales contract between the Mills and the Hogans. A. That is right; I understand that.

Q. Then when Mr. Mills wrote you two letters of November 29, 1946, which is Exhibit 2, and August 16, 1948, which is Exhibit 6, you are claiming, are you not, that those modified or changed the original contract? A. That is right.

Q. Now, then, when we come to this modified or changed contract we call it "said contract."

A. That is right.

Q. When I refer to it I refer to Exhibit 1 as modified by these two letters?

A. That is right.

(Testimony of Ruth C. Plastino.)

Mr. Winslow: I want it strictly understood that the defendants I represent do not construe it that way, but for questioning, yes, that is all right.

Mr. Rankin: As long as this witness understands, that is all I am asking right now.

Mr. Winslow: All right.

Q. (By Mr. Rankin): Had you had any notice of any kind or character—so as to make this general—of any change in your said contract after August, 1948, when he told you you [57] could skip payments? A. Never.

* * *

Q. From August, 1948, which was evidenced by Exhibit 6, up to January 30, 1951, evidenced by Exhibit 18, was there any change in your method of payment and the credits taken, interest charged, taxes charged, any different process than evidenced by these installment payments, Exhibit 24, where you listed all those payments as made?

A. There was no change.

Q. Over those years you adopted—do I understand you correctly, over those years you adopted the same methods?

A. As Mr. Mills originally suggested. [58]

The Court: That is Exhibit 25; not 24. Proceed.

Mr. Rankin: That is right. Thank you, your Honor. 24 is the detail, and 25 is the summary.

Q. When did you receive Mr. Mills' so-called cancellation letter of January 30, 1951, Exhibit 18?

A. February 7, 1951.

(Testimony of Ruth C. Plastino.)

Q. Can you tell the Court why you were so long in receiving that letter? A. Yes.

Q. What was the reason?

A. Our daughter was very ill, and we had gone to Bremerton over the week end.

Q. Where does she live?

A. Bremerton, Washington.

Q. Do you know what day January 30th was, 1951, what day?

A. I believe it was on a Friday.

Q. When you returned——

A. We returned on Sunday, and that was February 4th, and, working all week, we generally write or pay bills or make checks on Sunday, and on Sunday, the 4th, we made a check of $25 to Mr. Mills.

The Court: On what day?

The Witness: On Sunday, the 4th.

The Court: 4th of February?

The Witness: February.

The Court: You made out a check? [59]

The Witness: Of $25 for a payment.

The Court: You had not made payment since June of the previous year, had you?

Mr. Rankin: I am coming to that. I hoped to explain this payment first.

The Witness: May I explain a little before that, or shall I explain this payment?

Q. Let us center our attention right now on Sunday.

A. All right, we made this payment on February 4th, a Sunday. Now, being a holiday, Sunday, we

(Testimony of Ruth C. Plastino.)
might have dated the check the 5th for Monday, but we mailed that either Sunday night or Monday morning when I went to work.

* * *

Q. (By Mr. Rankin): Then what did you do?

A. We worked Monday nights until nine o'clock. My husband came down to dinner. We had dinner together, and we went home, and then he called me to tell me there was mail. He said, "We have a receipt here from the postman of a registered letter." Thursday I went to the post office before work and picked up that registered letter, and when I opened the letter it had in it this letter from Mr. Mills telling up [60] that our contract was cancelled as of the 1st of January.

* * *

The Court: I have given you a little extra time, hoping that you have had opportunity to look over all the exhibits. I am going to renew my suggestion that you now designate the exhibits of plaintiff to which you object.

Mr. Ralston: If the Court please, Mr. Winslow and have gone over the entire list of Plaintiffs' Exhibits during the intermission. We are going to object at this time to the following exhibits: First, Exhibits 23, 27, 28 and 29.

Mr. Rankin: Exhibits 23, 27, 28, 29.

The Court: Is that all.

Mr. Ralston: That is all.

(Testimony of Ruth C. Plastino.)

The Court: All of the other exhibits of plaintiff listed in the pre-trial order are admitted. [61]

* * *

Q. (By Mr. Rankin): I hand you, Mrs. Plastino, Exhibits 20 and 20-A and ask you now to put those exhibits in the [65] chronological statement of what occurred as you are giving it.

A. I just have one.

Mr. Rankin: There is a check attached there.

A. Oh, I beg your pardon. This is the check that we had sent out on Sunday to Mr. Mills.

Q. Pardon me. Perhaps you should have Exhibit 19 along with it. I think you will need that.

(Presenting exhibit.)

A. This is a copy of the letter, carbon copy that I had typed at my husband's dictation to Mr. Mills stating that our daughter had been very ill and having eighteen teeth extracted during her pregnancy, and I expected to take care of her working, and my husband had been out of work, and we had just gotten her settled down, and we would appreciate his waiting and giving us permission to skip payments when we were short. [66]

* * *

Q. (By Mr. Rankin): Did you send that letter which is marked Exhibit 19 to Mr. Mills before you received his letter of cancellation?

A. Absolutely did.

Q. Did that letter enclose the check, Exhibit 20-A, which is attached to the envelope and not to that letter? A. That is right.

(Testimony of Ruth C. Plastino.)

Q. Were those forwarded in that envelope marked Exhibit 20?

A. Well, this envelope is the envelope that Mr. Mills sent back to us with his cancellation, with the check. [67]

* * *

Q. Do you recall, Mrs. Plastino, when you did receive that letter, Exhibit 18, dated January 30th?

A. Yes, sir.

Q. When?

A. I went down—the first response when the registered letter comes and no one is home, they take it back and bring it to us, and the second response, if there is no answer, a note is left in the mailbox.

Q. That response came on—I think February 2nd was a Friday, a Saturday in 1945?

A. Due to the war condition, we had no Saturday delivery of mail, and Sunday I had made out this check to Mr. Mills and mailed it, and Monday, as I said, we worked until nine o'clock at night, and Mr. Plastino came from his work and met me, and we had dinner, and when he went home at six or seven o'clock, whatever the dinner hour was, he went home and called me of the mail that was there and told me there was a notice of registered letter left in the mailbox.

Q. When did you pick up the registered letter?

A. Tuesday morning of the 7th I went down to the post office. [68]

* * *

Q. (By Mr. Rankin): The Court made inquiry about why you had these delays in payment.

(Testimony of Ruth C. Plastino.)

Without going into too great detail, will you give a sufficient statement to cover why you did not make these payments at regular intervals and why you did skip them from time to time?

A. Well, after Mr. Mill told us it was all right to skip the six payments, he was sorry Sally was ill and we could skip the six payments and any other payments when we were short. I tried from time to time, with working and taking care of this sick girl and going back and forth with her little children, I tried to keep him posted that we were trying to get on our feet and would make payments just as soon as we could and try to pick up the back payments.

Q. Did you write him letters to that effect?

A. You have carbon copies of my letter that I wrote him.

Q. Why didn't you make the payments?

A. Mr. Plastino was working for the government as an inspector for Rent Control, and those jobs were being closed, and he was laid off. We were helping my son-in-law who was called home from different jobs because of my daughter's serious illness and the babies that she had, and we were really practically taking care of two families, and we wrote Mr. Mills from time to time that we were under terrific [69] pressure and appreciated his letting us miss these payments. [70]

* * *

The Court: I was going to tell you my view of the law at this time for what it may be worth. If I

(Testimony of Ruth C. Plastino.)

am incorrect, you may straighten me out, but I think it might shorten the testimony.

It seems to me that where a person buys property on a contract and makes payments over a period of two or three years, particularly after receiving the type of letter that was received by the Plastino's to the effect that, "You may skip a payment," and particularly where payments have been skipped, the holder of the contract may no longer rely on the [71] provisions in the contract to the effect that time is of the essence and that prior to the time that a default or a forfeiture is declared a written notice must be given to the party giving him a reasonable time within which to make up the past due payments. I think that on the basis of the testimony I have heard from plaintiff—of course, I have not heard the testimony from Mr. Mills—that the forfeiture should not have been made, particularly in view of the letter, Exhibit 16, and particularly in view of Exhibit 17, if that was actually sent and received. [72]

* * *

The Court: When was the original contract recorded, on the 29th of August, 1949?

Mr. Rankin: Right.

Mr. Winslow: And endorsed thereon an assignment from Hogans to the plaintiffs.

Mr. Rankin: Yes.

* * *

(Testimony of Ruth C. Plastino.)

Mr. Rankin: Do I understand that Exhibits 27, 28 and 29 are now admitted?

The Court: 27, 28 and 29 are admitted for what they are worth. [81]

* * *

Q. Mrs. Plastino, I hand you Exhibit 13, 13-A, and 13-B and call your attention to certain check marks that are after the dates of payments as given in that instrument.

* * *

Q. Those check marks, were they on there when you sent that instrument to Mr. Mills?

A. No, they were not.

Q. Were they on there when it was returned?

A. Yes, that is right.

Q. That letter shows the only criticism that Mr. Mills had, is that correct, that is, the one cent difference is all? A. That is correct.

Q. After you went there in November of 1945, how many visits did you make to Tillamook to this property between that and January, 1951?

A. We were there in 1947 and again in 1949.

Q. At what time in 1947 and 1949?

A. The last, the last two weeks of August. That would just take us beyond the last of the month getting back to work [82] just after Labor Day of both years. We took our vacations at the same scene.

Q. At those times did you see Mr. Estber Mills?

A. Those were the only two times I have ever seen Mr. Mills excepting now.

Q. At those occasions did he have anything to say about your payments or the lack of payments?

(Testimony of Ruth C. Plastino.)

A. Not a word; not a word.

Q. Did he make any demand upon you for payment? A. Not a thing; not a word.

Q. For performance? A. No, sir.

Q. In general, without going into detail of your conversation, what was the substance of your conversation?

A. In 1947 after my daughter had written me and we had taken over the property because of her financial condition, he showed Mr. Plastino and I from the highway the approximate lines of the property we were buying. That was in 1947.

Q. What was the next time you visited?

A. And in 1949 after my daughter and son-in-law had assigned the contract over to Mr. Plastino and I we went in to see him, and Mr. Plastino asked him to go to the courthouse and acknowledge the contract in order that he might have it recorded.

Q. Those were all the matters that you remember that had any bearing on this? [83]

A. All outside of the fact that when he told us when we finished paying up the contract he didn't have any use for the water front. He knew we were going to use it for residence, and we could have it.

Q. In your correspondence are you thoroughly familiar with all that transpired with Mr. Mills and with your husband? A. Yes, sir.

Q. You said this morning something about taking dictation through typewriting.

A. Well, most generally Mr. Plastino will write

(Testimony of Ruth C. Plastino.)

it off in handwriting, and I will type it and a carbon copy, and he signs it.

Q. That is your familiarity——

A. That is our procedure.

Q. I hand you this Exhibit 14 and ask you if that is the first time you became aware of any tax payments that were not confined to the property you were buying?

A. Yes, this was written by me.

Q. Is that your notice to Mr. Mills?

A. Yes, sir.

Q. Did you get a reply from Mr. Mills about that? A. Yes, we did.

Q. I hand you Exhibit 15 and ask if at any time you ever received any information from Mr. Mills correcting the taxes that he had charged, correcting the amount of the taxes that he had charged? [84]

A. Never.

Q. Was there ever any segregation of Lot 8 as disclosed by this map? A. No.

Q. From the the residue of Lot 8 as it is covered in the government survays?

A. No, Mr. Plastino requested it, but it was never done.

Q. When did you first have notice that timber had been taken from your lot that you were buying under contract?

A. I believe on the evening of Tuesday, let's see, Sunday was the 23rd, Monday the 24th. I would say, I believe, on Tuesday, the 25th, in the evening after we saw Mr. Mills.

(Testimony of Ruth C. Plastino.)

Q. What year? A. 1953.

Q. Had Mr. Mills at any time ever advised you in any manner that he was selling the timber off of your property or this property you had under contract? A. Didn't have any idea at all.

Q. There is some evidence that you had made tenders on February 2nd and the letter of Hathaway, August 24th, and a tender into court. Did you make those covering from 1951 to the time in 1953, did you make any oral tenders in addition to those to Mr. Mills for the rest of the amount due under your contract?

A. On Monday, August 23rd or 24th, we talked to Mr. Mills personally, of 1953. [85]

Q. Where?

A. At his fishing—his place of business at Bay City, Oregon.

Q. What did he say?

A. We went to him. He was not in at first, and we went back later in the afternoon and waited until he came. At Mr. Hathaway's suggestion we told him that we came over to see if we could pay him up in full and could get the deed to the property. He told us that he had cancelled our contract, asked if we received a letter. We said we had never received a foreclose, "We have a letter from you." He said, "You missed some payments, and I paid the taxes;" that he had paid the taxes, and we had missed the payments.

Q. Did he offer to sell you the property?

(Testimony of Ruth C. Plastino.)

A. He said, "I foreclosed on you because I was paying the taxes and you missed some payments." I reminded him he had written us a letter telling us it was all right if we missed six payments, any payments if we were short. I told him we had to get Mr. Hathaway, he was the attorney, and we had seen him. He says. "Has Hathaway got the letter?" I said, "yes, he has." He said, "I'll tell you, I will sell you the property for $1,200." I said, "You ought to be ashamed to offer that property to us for another sale when we have already paid in close to $900." Then Mr. Plastino stepped up and said, "We are not interested in any repurchase of this property. We came here at the suggestion of [86] Mr. Hathaway to offer you the full amount including interest of what we owe on that property and ask for a deed." He said, "We feel it is best to try to settle this and save us both money without going into court." He said, "You can go back to Hathaway. I don't give a damn whether you go to court or not. I have a smarter lawyer than you have, and two or three hundred dollars in court doesn't mean anything to me.

Q. Did you visit the property at that time?

A. Not until we went back to Mr. Hathaway and gave him the message of Mr. Mills and left our check with him that he was going to send to Mr. Mills.

Q. Did you go back on the property?

A. We ate dinner and then went back to the property.

(Testimony of Ruth C. Plastino.)

Q. What did you find there?

A. We found a road there and thought at first it was a county road, and we walked up and we found this 14 foot cat road, and trees in the roadways, slashings and as we walked up we saw all the timber gone so we went back home, and the next morning we went down and reported it to Mr. Hathaway.

Q. Did you take any pictures?

A. Not that day. We took the pictures the next day or two after we told Mr. Hathaway what had happened over there. He told us if he were us he would try to find out who cut the logs in there and how they were cut.

Q. What did you take the pictures for? [87]

A. To show the condition of the property and the slashings that were left in the roadway and the way the property had been, I would say, from what he had wanted to purchase it for. It had practically been just devastated as far as trees and shrubs, natural growth on the property.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Winslow: [88]

* * *

Q. Now, the record shows that— you have testified of receiving this notice from Mr. Mills, a letter stating your contract had been cancelled. You remember that; do you not? A. Yes, sir.

(Testimony of Ruth C. Plastino.)

Q. Have you ever written, telephoned, or corresponded with Mr. Mills in any way after receiving that letter along about the 1st of February, 1951?

A. On the advice of my attorney in Seattle——

Q. Just answer my question, please.

A. No. [98]

* * *

Redirect Examination

By Mr. Rankin: [113]

* * *

Q. How did you, after January 30, 1951, when you got the alleged cancellation letter, again communicate with Mr. Mills?

A. My attorney in Seattle said, "When a man sends you back a check and tells you he is going to foreclose, your move is not the next one; it is his, and you wait until you get a notice of foreclosure, and you have your check ready to tender to your attorney."

Q. You did not get any notice of foreclosure from Mr. Mills? A. Not at all.

Q. Did your attorney say that you had gotten a letter of foreclosure. A. No.

Q. Well, then, I did not understand your answer. When you got this letter of cancellation did you discuss it with your lawyer?

A. That is right.

Q. Your lawyer's advice was what?

A. Was to sit tight and wait until I got a notice of foreclosure.

(Testimony of Ruth C. Plastino.)

Q. Did he say further what you should do?

A. Then he said, "If I were you, I would get my contract up-to-date and take your last statement from the man you are buying it from and be ready to tender that check into court to save your equity in the——"

Q. Was that the reason you made no further communication [114] with Mr. Mills?

A. That is right.

Q. When you delivered this $675—was it a check? A. That is right.

Q. $675 check, was that a check that you had from the previous series of payment?

A. No, sir.

Q. Where did you get the number?

A. We have a letter from Mr. Mills, on the back on it, telling us what the balance was. When we wrote back up to ask if our balance was correct, the taxes were always a little bit confusing, he said that our balance to date is so much. That is the letter we had from him. [115]

* * *

ESTBER MILLS

defendant, called in his own behalf and on behalf of defendants, having been first duly sworn, was examined and testified as follows: [121]

* * *

Cross-Examination

By Mr. Rankin: [128]

* * *

Q. (By Mr. Rankin): You took up with them the matter of their payments when they were there in 1948 or 1949? A. Yes, sir.

Q. You never made any written demand on them? A. No, sir.

Q. After 1948 and 1949 they continued to be delinquent or even skipped payments; did they not?

A. I think so; yes, sir.

Q. They did, didn't they?

A. Yes, sir, I think so.

Q. Did you make any objection after 1948 or 1949? A. No, sir. [130]

Q. Why not?

A. I am not much of a hand to write letters.

Q. You wrote some. It was not important enough for you to have your contract kept up-to-date that you would write them if you were insistent upon their making their payments?

A. I tried in every way I could to have those people pay, everything to help them in all I could, paid their taxes, everything else.

* * *

(Testimony of Estber Mills.)

Q. Now, you say at the time you sold that it was worth $50; is that true? A. Yes, sir.

Q. Didn't your conscience hurt you when you charged these kids $1,575.

A. I don't believe it does if they come after you, I don't know that it does.

Q. It does not hurt your conscience?

A. Pardon?

Q. It does not hurt your conscience?

A. No. [131]

Q. I think that is probably true.

Mr. Ralston: I move to have that stricken.

Mr. Rankin: That is agreeable.

Q. You say you did not know—the reason for your putting it down to $50 was because you did not know it had been logged off before; is that right?

A. That is right.

Q. I hand you Plaintiff's Exhibit No. 11 dated April 6, 1949, and ask you if that is your recollection now of when it was—ask you whether or not you have any recollection now about that property being logged off?

A. The question is what now?

Q. Does that refresh your memory to the effect that you did know as early as April, 1949, that it had been logged off? A. Yes, sir.

Q. You also passed judgment on the timber that was left there in 1949 also in that letter, didn't you?

A. No, sir.

Q. Don't you say, tell these people that you do

(Testimony of Estber Mills.)

not think it is worth their while to attempt to log the rest of that?

A. Well, yes, no specific price. [132]

* * *

SIGMUND WENDLING

a defendant, called in his own behalf and in behalf of defendants, having been first duly sworn, was examined and testified as follows: [139]

* * *

Q. When you sold this timber you attempted to sell it to the Publishers' Paper Company, did you not, Mr. Wendling? A. I did.

Q. What price were you putting on it [152] then?

A. The exact price that I was trying to get, $1,500 out of it. That is all I wanted out of it, just what I had in it.

Q. I call your attention to Exhibit 30 which is the agreement between Publishers' Paper Company and Sigmund J. Wendling and ask you if you fixed any price there for the timber that you were selling? A. That is right.

Q. You did ask them how much per thousand?

A. They stated a price they would give me per thousand, and it was put into this.

Q. You agreed to sell it for that?

A. I did.

Q. What were the prices then?

(Testimony of Sigmund Wendling.)

A. The price here is $31 per thousand on No. 2 and No. 3, spruce and hemlock.

Q. Did you think that was a fair price at that time?

A. That was more than a fair price. I was tickled to death if I could have got that.

Q. Quite a bit more than you testified as to the value now? That was quite a bit more than you would testify as to the value now?

A. It isn't worth that much now at all. [153]

* * *

W. HENRY THOMAS

recalled, testified as follows: [159]

* * *

Redirect Examination

By Mr. Rankin:

Q. Mr. Thomas, from your experience, where there is a stumpage cruise with some subsequent tally that indicates accurately, such as the cruise of a third party who is competent to make cruises, what has been, in your experience, the relevancy of the stumpage cruise with respect to an actual cruise or an actual tally, I should say?

A. Well, they have been very close.

Q. What degree, if any, of variation does your experience tell?

A. I would want to modify that, but I would answer that this way, Mr. Rankin: Cruising timber in

(Testimony of W. Henry Thomas.)

itself is not an exact science. Ten per cent leeway, plus or minus, is not out of line. When you get into a stump cruise, if the stump cruise is made properly, the man making that, knowing the inaccuracy or the errors that are apt to develop in a timber [171] cruise, has to be more conservative, and he must allow for other things, unforeseens. I would just say that in a stump cruise you could be off 15 per cent plus or minus. [172]

* * *

RAY DOUGLAS

a defendant, called in his own behalf and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

* * *

Q. What did you do with the contract or whatever you got from Mr. Mills? What did you do with it?

A. Well, Mr. Wendling came up to the beer tavern. My brother and I operate a beer tavern, and Mr. Wendling and I got acquainted through there. He would come in and drink a bottle of beer once in a while, and he was asking me, said he heard there was a little bunch of timber over there. He wanted to know—he knew that I knew Joe Mills, I had dealt with Mills. We had a couple of deeds.

(Testimony of Ray Douglas.)

Q. A little louder. [175]

A. He financed for a couple of deeds. So he says he would like to get hold of that little bunch of timber over there just to hold him through the summer. He didn't have nothing to do, and he told me that he would give me a hundred dollars if I could make a deal with Joe. He didn't know Joe, and I knew Sig. I says, "Well, if I can get the timber for you, it won't cost you a dime. You are a good customer of mine. I will do what I can." He says, "I will give him $1,500 for it if you can get it." So he gave me the cash, fifteen one hundred dollar bills. I went up to Joe's Cannery. Joe said, "Sure, you can have it for that." We went up to the place, and Joe wrote out, got the description of the land where it was at. He wrote me out a contract for it. I took it back to the beer tavern. Wendling was still there. I signed my name to it right over to him, and Mr. Wendling had the contract.

Q. You gave Mr. Mills Mr. Wendling's money?

A. I gave Mr. Mills the $1,500 cash. [176]

* * *

Cross-Examination

By Mr. Rankin: [179]

* * *

Q. What did he say about your buying the property, or how much did he ask you to pay for the property? Didn't he offer to sell you the whole Lot 8?

(Testimony of Ray Douglas.)

A. You mean the timber or——

Q. Well, I do not know. I am asking you. Didn't he offer——

A. No, I asked Joe what he would take for the timber. He said, "What will you give me for it?" "Well," I said, "I got $1,500 I can give for it."

Q. Then didn't he say, "I will sell you the land, too"? A. Yes.

Q. Yes, and how much did he want for the land outside of the timber if you would buy it?

A. He offered the lot and timber. He says, "You can have the land." I says, "I don't want it." [180]

* * *

CLARENCE K. WARREN

a defendant, called in his own behalf and in behalf of defendats, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow: [182]

* * *

Q. Who assisted—did you have any partnership or any joint operation with any other of the defendants?

A. George Hodgdon and I logged it.

Q. That is what I am trying to find out.

A. Yes.

Q. Now, let me ask you this. Where did you sell your logs that were taken off of that property?

(Testimony of Clarence K. Warren.)

A. Sold it to Publishers' Paper at Manhattan.

Q. Any other place?

A. We sold approximately around 9,000 feet to the Oregon Pulp. We sold three loads of short logs on a short log truck which would run about, oh, I would say it would have been around twenty-five to three thousand feet to the load that we sold to the Oregon Pulp.

Q. How much did you sell to Publishers'?

A. Oh, I would say around 165,000 feet, 160,-000 or 165,000, something like that.

Q. Did you and Mr. Hodgdon remove from that property all the timber that was taken out? Was there any other timber taken out except by you and Mr. Hodgdon? A. No, sir. [185]

* * *

Q. What timber was left there when the operation folded up?

A. Well, I figured there was around approximately 75,000 on the west side of the creek. I went in there, and I felled and bucked in there, I figured 40,000 feet.

Q. Half of it was felled and bucked and the rest of it was standing?

A. The rest of it was standing. [186]

* * *

Mr. Winslow: I just want to get the transaction. Did Mr. Harveston take over the balance of this timber? A. Yes, sir, he did.

Q. Did he pay you anything for it?

(Testimony of Clarence K. Warren.)

A. He gave me $225, a check for $225, and I paid for the contract. It was $25 for drawing up the contract. [190]

* * *

The Court: For $225 after you obtained an extension from Mr. Mills, is that——

The Witness: Yes, I went to Mr. Mills and asked for some more time.

The Court: To remove it?

The Witness: Yes, the time was up. I think it was the 5th of October, and I went to Mr. Mills, and I asked him if I could have more time on it, and he says, "You sure can," he says, "How much do you want?" I said, oh, "Give me a year on it." He said, "Well, let us make it up for six months, and if you need any more you come back, and I will give it to you." And I turned around, and I sold it to Red Harveston then.

* * *

Cross-Examination

By Mr. Rankin:

Q. Mr. Warren, when you started your dealing with this timber did you make any investigation as to the title to it? A. No, I didn't. [191]

Q. That is, did you ask Mills whether he had any outstanding contract?

A. I did not know Joe Mills at the time.

Q. Did you make any investigation on the records of the county? A. No, sir.

(Testimony of Clarence K. Warren.)

Q. When the Plastinoes spoke to you did they tell you that they did not know who would be made defendants in this case; that that was up to their attorney?

A. They told me that Joe Mills was the one they would hold liable.

Q. Just answer my question, Mr. Warren. Did they tell you that who would be made defendants was up to their attorney? Who would be made defendants in this case was up to their attorney?

A. No, sir. [192]

* * *

Q. So you do not know what was taken off by you in the shape of board feet?

A. Yes, I do. We took out 165 to 170,00 feet.

Q. All right, how do you know that?

A. Well, we got paid for that anyway.

Q. Where is the scale upon which you were paid? [194]

A. George Hodgdon has it.

Q. You do not have any records of that nature?

A. No, sir, he had his own bookkeeper, and she took care of the whole works. [195]

* * *

Q. Did you know Lyle Simmons in this deal?

A. Yes, sir.

Q. When did you meet him?

A. I have knew him for five years.

Q. When did you meet him in respect to the deed?

(Testimony of Clarence K. Warren.)

A. I went to him, asked him if he wanted to go into partners with me on it.

Q. Did you buy any of Simmons' interest?

A. No, sir.

Q. Do you know who did buy Simmons' interest?

A. Yes, sir.

Q. Who? A. George Hodgdon.

Q. Do you know what he paid Simmons for his interest? [198]

A. Well, he told me, I think it was around $400. That is for his labor.

Q. You and Hodgdon were in partnership on this; were you not?

A. Yes, we were.

Q. Did you know how much your partner paid Simmons for his interest in the timber?

A. It was either $400 or $450; I don't know which.

Q. Simmons would not go on with this deal, would he? A. No.

Q. Why did he get out?

A. Well, because I didn't get a contract on it right away. [199]

* * *

LYLE SIMMONS

defendant, called in his own behalf and in behalf of the defendants, having been first duly sworn, was examined and testified as follows: [237]

* * *

Cross-Examination

By Mr. Rankin:

Q. Did you give all of that conversation, Mr. Simmons?

A. Possibly not. I don't remember just exactly all that conversation we did have.

Q. Do you recall that in that conversation you said you got out because the job stunk?

A. I did.

The Court: What do you mean by the fact that the job stunk?

The Witness: At that time we was working in there without a contract. We never had anything to show that we should be in there.

The Court: From whom did you think you ought to have a contract?

The Witness: Mr. Wendling. He was the man that Warren dealt with on the timber, but for some reason they kept putting it off.

The Court: Did you know about the Plastinoes?

The Witness: I did not know a thing about the matter until he come to my house.

The Court: That is what you mean when you said that the job stunk; you thought you ought to have a contract?

The Witness: That is right, just the same as we

(Testimony of Lyle Simmons.)

were in there stealing it. Without a contract we had no business [241] in there.

Q. (By Mr. Ranklin): Did you inquire, make any title research or have any inquiry about it yourself? A. Not a bit. [242]

* * *

OSCAR TITTLE

defendant, called in his own behalf and in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow: [243]

* * *

Q. Well, now, this one item has been developed here that it was your equipment that built this road in on this Lot. 8. Do you know where that lot is, of course? A. Yes, well——

Q. Yes?

A. I didn't know what lot it was on. I built a road in there.

Q. But you recognize the property, the lot here in court that we are talking about here; do you not? A. Yes, I do. [244]

* * *

Q. * * * Let us see what you were paid for it.

(Witness consults document.)

A. On May 19, 1952, we moved in on May 19th

(Testimony of Oscar Tittle.)

and did some more work on May 30th, and on May 31st we finished up, and the total amount of the bill was $283.37.

* * *

Q. It was your equipment and your hired men?

A. When we move those cats, we have to pilot them according to the State Highway Laws, and I piloted the cat out there with my car, and they unloaded, and I left. [245]

* * *

FRANK M. STEVENS

a witness produced in behalf of plaintiffs, having been first duly sworn by the Court, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Where do you live, Mr. Stevens?

A. Tillamook, Oregon.

Q. How long have you lived there?

A. About thirteen years.

Q. What is your business?

A. Real estate salesman. [253]

* * *

Q. (By Mr. Rankin): Have you an opinion, Mr. Stevens, as to the value of this Lot 8?

A. Yes, I have.

Q. Is this opinion fixed on the date of approximately June, 1952?

A. It is based on the property as I could recon-

(Testimony of Frank M. Stevens.)

struct as to the best of my ability after looking it over. If that is the date, that is correct.

Q. What is your opinion as to the value?

A. Between $3,200 and $3,500. Now, Mr. Kerr and I have debated the question. We have discussed it. We looked it over together. We had some differences of opinion. We were not able to arrive at a very definite figure. As a compromise, however, we did agree that somewhere between $3,200 and $3,500, in our opinion, the property would be salable for.

Q. You looked at it this morning?

A. Yes, sir.

Q. What do you think the value of it is now as of this date?

The Court: Is that an issue in this case?

Mr. Rankin: It shows the difference in value from the time before the removal of timber to the date now.

The Court: No, you are going to have to do it immediately after the removal of the timber.

Mr. Rankin: The timber was removed, the last of the [261] timber under the contract, so far as we know, just prior to expiration of that contract in December, 1953.

* * *

Q. (By Mr. Rankin): What do you think your value of this particular tract, Lot 8, is now?

A. Well, as a result of our observations and taking into consideration several different factors, I would consider it reduced by 75 per cent.

Q. Did you find any slashings, logs, left on the

(Testimony of Frank M. Stevens.)

property? A. Yes.

Q. When you inspected this morning?

A. Yes, sir.

Q. Is there much of that?

A. Well, Iwould say there is quite a little bit.

Q. You spoke about the fact that you did not find that there was the same type of terrain for the purposes of view in other places as there was in this particular tract, Lot 8. Can [262] you enlarge upon your observations with respect to that in comparison with other property?

A. Well, the view from Lot 8 I would consider quite extensive. From the, it would be the north portion of it on the south slope there, the southwest slope, you have a very extensive view of the bay and the bar and the ocean, the City of Garibaldi, Bay Ocean, and, roughly going over in my mind, going back towards Tillamook, a comparable terrain through there would be the Malarky tract closer to Bay City. However, the view there would certainly not be the same. The A. F. Coate tract or what is commonly known as Hobsonville Point is, which is for sale and is excellent view property; however, I would not consider it exactly the same category.

Q. Which would you think preferable?

A. Primarily from the view standpoint, I would say Lot 8.

Q. Is there any territory or any part of this Lot 8 that is level?

A. Some of it; very little of it.

(Testimony of Frank M. Stevens.)

Q. With respect to that along the road, would that be adaptable to a motel?

A. Oh, I think so. [263]

* * *

RICHARD D. KERR

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

* * *

Q. How long did you live in Tillamook?

A. Six years.

Q. During that six years what was your occupation and business?

A. I have been a real estate broker about four years.

Q. What did you do prior to being a real estate broker? A. State Police Officer.

Q. During those four years have you sold any property in Tillamook? A. Yes, sir.

Q. I referred to the county. Have you sold any in the City of Tillamook? [281]

A. County and city both.

Q. Are you familiar with Lot 8 as we have termed it here? A. Yes, sir.

Q. You know what I mean by Lot 8?

A. Yes, sir.

Q. The Plastino tract. When did you see that

(Testimony of Richard D. Kerr.)

property? A. This morning.

Q. In company with whom?

A. Mr. Stevens.

Q. Did you satisfy yourselves where the lines were? A. Yes, sir.

Q. Do you know the size of the lot?

A. Yes, sir, that is, I am satisfied with the lines as they are brushed out, if those are the correct lines, I am.

Q. The testimony is to the effect that Mr. Marshall did making some brushing-out of those lines. Did you have any sales of property of that nature?

A. Yes, sir.

Q. How long ago were those sales?

A. In the past two years.

Q. Where were they located?

A. Well, there was two sales—they are not entirely the same property.

Q. That would be impossible, to get the exact property, would it? [282]

A. Within five or six miles of the area.

Q. In going over this property then what did you determine were its valuable features, if you found any? A. You mean in its state now?

The Court: The valuable feature that I would see there now.

The Witness: There still is some there. I don't know how much because I am not a timber cruiser, and then there is reforestation possibilities along with the balance of the standing timber.

Q. (By Mr. Rankin): What with respect to

(Testimony of Richard D. Kerr.)

residential possibilities upon a development that might occur later?

Mr. Winslow: I am going to make a little objection, "might occur," probably, that is what we are interested in.

Q. (By Mr. Rankin): Possibly, probably, all right.

The Witness: Would you repeat your question, please?

Q. Did you find any values there that might be attributable now to residential purposes, that probably would occur and develop?

A. There is one portion of the property that has been logged. That, if it was planned right, might have or would have a residential value.

Q. You have told me where the other sales, I think you mentioned one. Where are the other sales similar to this?

The Witness: Well, the other sale I had in mind—— [283]

The Court: He did not tell us where, what the sale was.

The Witness: Do you want them testified to, the lot and block?

The Court: If you have the name of the seller and the buyer.

The Witness: The property was the R. L. Miller tract, a 20-acre tract, 18 acres of timber brush land, and 2 acres of brush and a house sold for $6,000.

The Court: How many room house?

The Witness: It would be a four-room house,

(Testimony of Richard D. Kerr.)

and the other tract was a 2-acre tract behind Bay City. That sold for $250.

Q. (By Mr. Rankin): Similar type of land?

A. It would be a similar type in some respects. I mean, there would be variations.

Q. Did it have view possibilities of a view such as this?

A. Yes. It would have—I based that on what I would feel that a 2- or 5- or 8-acre tract, it would depend on how many acres I would have to give to them, but such has a bearing on the upper portion of that land, is where I would base that variation of around $250.

Q. From your inspection and your familiarity with these properties in and around Tillamook, have you an opinion as to the value of Lot 8?

A. As of what date? [284]

Q. As of June, 1952?

A. If that is the date before the timber was logged?

Q. That is right.

A. I would place the value, in my opinion, of approximately $3,400.

Q. You say before the timber was removed?

A. That is right.

Q. You saw the lot this morning where the timber has been removed. What would you say the value would be now?

A. Well, that would depend upon how I—or how somebody sold the property, whether it was sold, if somebody went in and was able to sell one or two

(Testimony of Richard D. Kerr.)

residential sections we would place a value on them. If it was sold for a tree farm and the balance standing timber to a large company, we would place another value on it.

Q. Well, the testimony is it was purchased for residential purposes. The plaintiffs claim they did not have in mind any reforestation, but they did have in mind a motel, residential purposes.

Mr. Winslow: I do not recall that testimony myself.

Mr. Rankin: Oh, yes, the daughter told them about it. They went down there and confirmed it.

Mr. Winslow: I do not recall it.

The Witness: What question do you want me to answer?

The Court: The question is objected to anyway because [285] it would not make any difference what they had in mind. The question is what is the highest and best use of that property at either of these two dates.

Do you want to take an objection to that?

Mr. Rankin: What I had in mind was that it did have some value or that it did some relevancy as to what these individuals purchased the property for. There is not a development of a similiar nature for this kind of property that I know of around there. There is going to be one some day. There is somebody going to have to pioneer into that field of development. There are hills there that have houses on them. They are going to look for views; consequently, if these people found a value there

(Testimony of Richard D. Kerr.)

for that and a desirability, then the value would follow in their desire to improve that property.

The Court: That is not basis of determining the damages, Mr. Rankin. I am sure that if Meier & Frank Company wanted to build a department store and wanted it for that purpose, it would be worth many, many thousands of dollars, but you cannot determine a value on a basis of speculation and possibility. It must be a price. All these factors must be reflected in the market value of the price.

Mr. Rankin: I think your Honor is correct.

Q. What would you say, Mr. Kerr, is the fair market value of Lot 8, at the present time, taking into consideration your [286] experience, the sales that you know of, and your review of the property itself?

The Witness: Approximately $1,200. [287]

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the district of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer of defendant George Hodgdon; Answer of Estber Mills and Edna Mills; Answer of Ray Douglas, et al; Pre-trial order; Findings

of fact and conclusions of law; Opinion; Judgment; Objections to findings of fact, conclusions of law and judgment; Order overruling objections; Notice of Appeal; Cost bond on appeal; Designation of record; Order for transporting original papers and exhibits; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7293, in which Michael R. Plastino and Ruth C. Plastino are plaintiffs and appellants and Estber Mills, et al, are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is $5.00 and that that the same has been paid by the appellants.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, (Volumes 1 and 2). Under separate cover we are forwarding plaintiffs' exhibits 1 to 56, inclusive and defendants' exhibits 100 to 106, inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 13th day of June, 1955.

[Seal] F. L. BUCK,
Acting Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 14789. United States Court of Appeals for the Ninth Circuit. Michael R. Plastino and Ruth C. Plastino, Appellants, vs. Estber Mills and Edna Mills, Husband and Wife; Ray Douglas and Pauline Douglas, husband and wife; Sigmund Wendling and Dorothy Wendling, Husband and Wife; Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren and Oscar Title; Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14789

MICHAEL R. PLASTINO and RUTH C. PLASTINO, Husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS; GEORGE HODGDON; C. K. WARREN; and OSCAR TITTLE,

Appellees.

STIPULATION

It is stipulated between the undersigned parties that in lieu of printing the depositions of Loran D. Harveston, George Hodgdon and C. K. Warren, the narrative statement of their testimony in such depositions, which is recited in the Pretrial Order dated May 20, 1954, and signed by the Court and the respective parties and which will be printed in the transcript of Record under the supervision of the clerk of the above entitled court, is a fair and sufficient statement of the material matters as to appeal before the appellate court, and the printing of said depositions may be dispensed with.

Dated June 17, 1955.

/s/ ROBERT R. RANKIN,
Attorney for Plaintiffs-Appellants.

GEORGE P. WINSLOW, and
WM. C. RALSTON,

By /s/ WM. R. RALSTON,
Attorney for Defendants-Appellees,

/s/ IRVING RAND,
Attorney for Defendant-Appellee, George Hodgson.

[Endorsed]: Filed June 23, 1955.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Appellants intend to rely upon the following points on appeal or the above-entitled cause that:

1. Jurisdiction is supported by diversity of citizenship and an amount involved in excess of the statutory requirement and applicable appellate statutes.

2. Trial Court erred in not finding and decreeing the whole contract between appellants and appellees Mills, including the modifications of the

original and appellants assumption of and performance of the entire contract when

(a) Appellants preserved their right to specific performance by their own performance and tenders, and

(b) Appellants did not breach or abandon the contract.

3. Trial Court erred in not finding and decreeing appellees Mills breached and attempted cancellation of their own contract as modified and performed, when appellees Mills

(a) had waived material parts of the original contract upon which their attempted cancellation was based;

(b) gave no notice to appellants of a reasonable period for performance before attempted cancellation;

(c) declared and attempted to enforce a forfeiture on waived provisions of the contract.

(4) Trial Court erred in not finding a confederacy between appellees by which they logged appellants' property and caused damage which should at least be doubled in amount.

(5) Trial Court should have abated the purchase price in accordance with the area purchased.

(6) That appellees come into court with "unclean hands."

(7) That appellants are entitled to specific performance and damages.

/s/ ROBERT R. RANKIN,
Attorney for Appellants.

To Wm. C. Ralston, George P. Winslow, and Irving Rand,

Public Service Building, Portland, Oregon,
Attorneys for Appellees.

Service of copy acknowledged.

[Endorsed]: Filed August 10, 1955.